The EU Court as a Human Rights Adjudicator: Cases *Achbita* and *Bougnaoui* from an institutional perspective

Master thesis
Olivia Packalén-Peltola
Faculty of Law
MICL / PIL
University of Helsinki

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In cases *Achbita* and *Bougnaoui* (March 2017), the EU Court ruled for the first time on the limits of religious manifestation at work. In the cases, the Court had to take a stance on whether the prohibition of religious scarves in a private-sector enterprise constituted a breach of EU law. In principle, it answered in the negative. The thesis argues that the rulings constitute a rupture to the EU Court's previous non-discrimination case law. Instead of acknowledging the importance of religious non-discrimination for the European project in general and inclusive labor market in particular, the decisions seem to downplay its significance in relation to other grounds for discrimination recognized by EU law. Second, and also contrary to its common habits, in its argumentation the EU Court drew heavily on the European Court of Human Rights' case law. Both of these findings beg the question of why.

The thesis argues that the EU Court's line of reasoning in the two cases reflects its institutional positioning, as elaborated by Moorhead. In its adjudication, the EU Court aims at sustaining the supremacy of EU law, in a manner consistent with the Member States' constitutional requirements, while also advancing the project of European integration. This requires careful balancing and results into a body of case law that is internally inconsistent and difficult to predict. In *Achbita* and *Bougnaoui*, the EU Court decided to prioritize stability over legal coherence. As a by-product, the thesis reveals some of the problems still attached to the European human rights regime. Both the ***raison d'être*** and the *modus operandi* of EU law and the ECHR are markedly different. The Lisbon Treaty has not eliminated the barriers between the two regimes, at least not in the field of non-discrimination, and comparative research continues to be necessary. The thesis concludes by arguing that in constructing the picture of the EU Court as a human rights adjudicator – a task that is more pertinent than ever – its institutional positioning has to be recognized as it has a direct bearing on its rulings. +++

Maaliskuussa 2017 EU:n tuomioistuin antoi tapauksissa *Achbita* ja *Bougnaoui* ensimmäisen päätöksensä koskien uskonnonvapauden rajoja yksityisellä työpaikalla. Tapauksissa oli kyse siitä, onko yksityisen työnantajan asettama uskonnollisen huivin käyttökielto työpaikalla EU-oikeuden vastainen. Periaatteessa tuomioistuin vastasi kieltävästi. Päätös on ristiriidassa tuomioistuimen aiemman yhdenvertaiseen kohteluun liittyvän oikeuskäytännön kanssa. Sen sijaan, että EU-tuomioistuin alleviivaisi syrjimättömyyden merkitystä Euroopan integraatiohankkeelle, erityisesti inklusiivisten työmarkkinoiden kehitykselle, se vaikuttaa toteavan, että uskontoon tai vakaumukseen perustuva syrjintä ei ole yhtä merkityksellistä kuin muilla EU-oikeuden tunnustamilla perusteilla tapahtuva syrjintä. Lisäksi päätöksissään EU-tuomioistuin nojaa vahvasti Euroopan ihmisoikeustuomioistuimen oikeuskäytäntöön, mikä on sille epätyypillistä. Tutkimus pohtii, mikä voisi selittää EU-tuomioistuimen oikeudellista argumentaatiota.

Tutkimuksen pääväite on, että EU-tuomioistuimen ratkaisut heijastavat sen institutionaalista asemaa. Tutkimus nojautuu Moorheadin luomaan teoreettiseen viitekehykseen, jonka mukaan oikeuskäytännössään EU-tuomioistuin pyrkii ylläpitämään EU-oikeuden etusijaa ja edistämään Euroopan integraatiota, kuitenkin siten, että päätökset ovat sopusoinnussa myös jäsenmaiden perustuslaillisten vaatimusten kanssa. Tasapainoilu eri tavoitteiden välillä on vaikeaa ja johtaa siihen, että EU-tuomioistuimet ratkaisut voivat olla keskenään ristiriitaisia. Tapauksissa *Achbita* ja *Bougnaoui* tuomioistuin päätyi priorisoimaan EU:n vakautta oikeudellisen koherenssin sijaan. Yhtenä tutkimustuloksena todetaan myös, että EU-tuomioistuimen ja Euroopan ihmisoikeustuomioistuimen oikeuskäytäntöjen vertailu on edelleen tärkeää, tässä tapauksessa syrjimättömyyden osalta, koska erot niiden institutionaalisissa taustoissa vaikuttavat niiden oikeudelliseen päättelyyn. Tutkimus tiivistää lopputulemanaan, että EU-tuomioistuimen tutkiminen ihmisoikeustuomioistuimena on Lissabonin jälkeen yhä tärkeämpää, myös institutionaalisesta näkökulmasta, koska se osaltaan selittää tuomioistuimen oikeudellista argumentaatiota. +++

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1 Introduction

1.1 Rationale

In March 2017, the Grand Chamber of the Court of Justice of the European Union (hereinafter the 'ECJ' or the 'EU Court') gave two long-awaited decisions in the field of non-discrimination. In cases *Achbita*[1] and *Bougnaoui*[2], the EU Court ruled for the first time on the limits of religious manifestation at work, as well as the legal capacity of a private-sector employer to impose those limits. In the cases, two female employees of two private sector enterprises had been dismissed due to wearing an Islamic scarf (a hijab) at work. The cases were brought separately to the ECJ for preliminary ruling by the Belgian (in *Achbita*) and the French (in *Bougnaoui*) Courts of Cassation, but it decided to give its decisions in parallel, on the same day. The questions directed to the Court were different in each case, but in essence, the Court had to take a stance on whether the prohibition of religious scarves in a private-sector enterprise constituted a breach of EU law, or not. In principle, the EU Court answered in the negative.

In general, limiting religious manifestation is a highly politicized issue in contemporary Europe. Opinions vary within societies but also between them. France and Belgium (where the two cases originate from) constitute the other end of the continuum, being secular states by definition, by posing legal restrictions on the wearing of religious outfit in public as well as in public employment. With all likelihood, non-discrimination and freedom of religion are also issues of growing importance, taking into account the increasing religious pluralism in Europe. Questions of religious tolerance continue to be debated across European societies.

From legal perspective, cases *Achbita* and *Bougnaoui* open up controversies. First, non-discrimination is one of the eldest competency areas of the European Union, as well as an area where the EU Court has traditionally been very active. With its non-discrimination case law, the ECJ has expanded the scope of EU law and thus acted as the *primus motor*

[1] Case C-157/15, Samira Achbita and Centrum viir gelijkheid van kansen en voor racismebestrijdning v. G4S Secure Solutions NV, ECLI:EU:C:2017:203.

[2] Case C-188/15, Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA, ECLI:EU:C:2017:204.

of European integration. In *Achbita* and *Bougnaoui*, however, the EU Court chose another path: instead of activism, it chose restraint. It failed to follow its own case law on non-discrimination, by setting the standard for religious discrimination lower than the standard for discrimination based on other grounds recognized by EU law. The decisions have been much criticized for this by legal academia.[3]

Second – and also contrary to its common habits – in its argumentation the EU Court drew heavily on the European Court of Human Rights' case law (hereinafter the 'ECtHR' or the 'Strasbourg Court'). Traditionally, the EU Court's human rights decisions have been much criticized due to failures to recognize the international environment in which also EU law operates.[4] In particular, coherence between the European Convention on Human Rights (hereinafter the 'ECHR') and EU law has attracted much scholarly interest, even more so since the adoption of the Treaty of Lisbon.[5] The question has grown in importance because in theory contradictions between the two human rights regimes should no longer be possible, EU primary law now giving full recognition to the rights guaranteed by the ECHR.[6] To buttress the point, TEU 6 (3), as amended by the Lisbon

[3] Vickers, L. (2017). Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace. *European Labour Law Journal, 8*(3), pp. 232-257; Hennette-Vauchez, S. (2017). Equality and the Market: The unhappy fate of religious discrimination in Europe. *European Constitutional Review,* 13 (4), pp. 744-758; Howard, E. (2017). Islamic headscarves and the CJEU: Achbita and Bougnaoui. *Maastricht Journal of European and Comparative Law, 24*(3), pp. 348-366; Collins, P. (2018). Covering Up? Client Embarrassment, Neutral Intolerance and Wearing Headscarves at Work. *Law Quarterly Review, 134*, pp. 31-37; Hambler, A. (2018). Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui. *Industrial Law Journal, 47*(1), pp. 149-164; Brems, E. (2017), European Court of Justice Allows Bans on Religious Dress in the Workplace. IACL Blog (International Association of Constitutional Law), [https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace], accessed 13 June 2019.

[4] de Búrca, G. (2013). After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator, p. 174. *Maastricht Journal of European and Comparative Law, 20 (2),* pp. 168-184; de Jesús Butler, I. (2008). Binding the EU to International Human Rights Law. *Yearbook of European Law*, 27 (1), pp. 277-320.

[5] E.g. Douglas-Scott, S. (2011). The European Union and human rights after the Treaty of Lisbon, *Human Rights Law Review, 11 (4)*, pp. 645-682; Alidadi, K., Foblets, M. & Vrielink, J. (2012). *A test of faith? Religious diversity and accommodation in the European workplace*. Farnham: Ashgate; Arestis, G. (2013). F*undamental rights in the EU: three years after Lisbon, the Luxembourg perspective*. European Legal Studies / Etudes Européennes Juridiques, Research Papers in Law, 2/2013; Arold Lorenz, N. (2013). *The European human rights culture: A paradox of human rights protection in Europe?* Leiden: Martinus Nijhoff Publishers.

[6] Art. 52 (3) EUCFR: 3. "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope

Treaty, obliges the EU to accede to the ECHR. Despite this obligation, after ten years, the accession process is still on hold. The main culprit is the EU Court, which has rejected the accession agreement, twice, thereby clearly expressing its unwillingness to subject its decisions to the scrutiny of the Strasbourg Court.

To sum up, in *Achbita* and *Bougnaoui* the EU Court abandoned its own case law in non-discrimination and instead aligned itself with the Strasbourg Court. From the perspective of coherence between the two human rights regimes, the conclusion might seem ideal.[7] However, as regards coherence of EU law, the conclusion seems controversial. What makes religious discrimination less important than discrimination based on other grounds recognized by EU law? Why in these two cases did the ECJ lean towards the Strasbourg Court, if it is not a standard procedure? What kind of a human rights adjudicator the EU Court is in the post-Lisbon era, and what are the issues affecting its line of reasoning? The aim of the thesis is to search answers to these questions through the two cases.

1.2 The increased importance of the EU Court as a human rights adjudicator

Traditionally, the EU Court has not been identified (and studied) as a human rights adjudicator. This is due to the simple fact that originally, human rights did not play any role in the European project; the founding fathers did not see them relevant to an organization with mainly economic aspirations.

To clarify, this is not to argue that the role of the EU Court in human rights protection would have been minor, just the opposite. It was precisely the (predecessor of the) EU Court, which soon found, that it was impossible to detach human rights from Community law, due to the fact that EC law could not provide lesser protection than national legal systems, all adhering not only to the European Convention on Human Rights (ECHR) but

of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[7] That said, as chapter 3.3 explains, direct referencing between the Strasbourg Court and the EU Court case law might not always be appropriate as the two regimes analyze cases from varying angles. The thesis argues that non-discrimination is one of the areas where the institutional differences between the two regimes should be taken into account.

also to several other international human right treaties. The solution invented by the EU Court was that it started to incorporate human rights into EU law through its adjudication.[8]

Legally, the situation changed considerably with the adoption of the Treaty of Lisbon, which continued expanding the scope of EU law. More specifically, the Charter of Fundamental Rights of the European Union (hereinafter the 'EUCFR') was elevated to the position of EU primary law. These elements together have increased the significance of the EU Court as a human rights adjudicator, also evidenced in the growing amount of cases raising human rights claims.[9]

Interestingly, the proliferating ECJ human rights adjudication has not always been well received, either by the EU Member States, legal academia or the larger international community. To start with, the Member States have accused the Court of excessive activism in its human rights adjudication, claiming that the Court interprets EU law in a way not compatible with national constitutional traditions or interests.[10] Non-discrimination is one the areas in which those accusations have taken place.[11] The EU Court has for instance been criticized for bypassing international human rights adjudication.[12] Also a UN report refers to the failures of the ECJ to seek guidance from international human rights bodies, whether out of ignorance or sheer neglect.[13]

[8] Douglas-Scott, S. (2011), pp. 647-649. This background, however, has not prevented the Union from presenting itself as a human rights forerunner. The Amsterdam Treaty (entering into force in 1999) added to the Treaties a blunt statement on the Union being "founded" on the principles of liberty, democracy and respect for human rights and fundamental freedoms – still expressed in Article 6 (1) TEU. Smismans has argued that human rights were included in the European project on one hand to safeguard the Union's growing competence in justice and home affairs, on the other hand to increase the legitimacy of the Union in the eyes of its citizens. Smismans, S. (2017). *Fundamental rights as a political myth of the EU: can the myth survive?* In Douglas-Scott, S. and Hatzis, N., eds. (2017). *Research Handbook on EU Law and Human Rights*. Northampton, MA: Edward Elgar Publishing Limited.

[9] de Búrca, G. (2013), pp. 169-170.

[10] Recent ECJ cases *Mangold (2005)*, *Schecke* (2010), *Kücükdeveci* (2010) and *Test-Achats* (2011) are examples of this. See further analysis for example in Muir, E. (2014). Fundamental Rights, an unsettling EU competence. *Human Rights Review*, 15 (1), pp. 25-37.

[11] de Búrca, G. (2011). *The Evolution of EU Human Rights Law*, pp. 492-493. In de Búrca, G., & Craig, P. (2011). *The Evolution of EU Law* (2nd edition). Oxford; New York: Oxford University Press, pp. 465-497.

[12] de Búrca, G. (2013), pp. 173-174.

[13] OHCHR report (2011). The European Union and the International Human Rights Law, p. 11.

The transition, then, from a court with purely economic *modus operandi*, to a court with a wide human rights mandate seems not to have been easy. Why is this so? For sure, the wider controversies related to human rights claims have to be acknowledged. As for example Young argues, even though there might be agreement as to such universal and indivisible goods as for instance human dignity or equality, there is much disagreement as to the content of these principles, not to mention the best means to achieve them.[14] The constitutional pluralism of the Union also poses its challenges.[15] That said, the thesis argues that a further explanation for the difficulties is to be found in the institutional positioning of the EU Court (see chapter 1.3. below).

Taking into account both the Court's multifaceted role and the increased focus of EU law on fundamental rights, the scholarly interest in analyzing the EU Court as a human rights adjudicator has been surprisingly low. Articles by de Búrca and Young referred to above, the latter building on the work of Weiler[16] are welcome exceptions, but no full-fledged theory exists. Theoretically, the thesis is a contribution to this discussion.

1.3 Institutional objectives of the EU Court: integration and stability

The key argument of the thesis is that the ECJ's line of reasoning in human rights cases reflects its institutional positioning. Surely, jurisprudential argumentation always has its contextual roots. However, the EU context is somewhat exceptional in a sense that in its adjudication, the EU Court needs to take into account the underlying political objective of the Treaties i.e. integration.[17] In general, the EU Court's role as the *primus motor* of

[14] Young, A. L. (2017). *EU fundamental rights and judicial reasoning: towards a theory of human rights adjudication for the European Union*, p. 141. In Douglas-Scott, S. & Hatzis, N., eds. (2017). *Research handbook on EU law and human rights*. Northampton, MA: Edward Elgar Publishing Limited, pp. 139-161.
[15] Young (2017), pp. 143-144.
[16] Weiler, J.H.H. (2009). *Fundamental rights and fundamental boundaries: Common standards and conflicting values in the protection of human rights in European Union space*. In Kastoryano, R., ed. (2009). *An Identity for Europe. The Relevance of Multiculturalism in EU Construction*. Basingstoke: Palgrave Macmillan.
[17] Moorhead, T. (2014). *The legal order of the European Union: The institutional role of the European Court of Justice*. Abingdon, Oxon; New York, New York: Routledge, pp. 6-11. See also e.g. Bengoetxea, J. (1993). *The legal reasoning of the European Court of Justice: Towards a European jurisprudence*. Oxford: Clarendon Press.

European integration is widely acknowledged in academic research.[18] To be able to serve the purposes of integration, the Court has adopted the doctrines of direct effect and supremacy, which it has an institutional interest in safeguarding.[19]

The other, perhaps less recognized institutional task of the ECJ is promoting the stability of the European project in the longer term. To do this, it has to respect the sensitive national interests involved in each case, a task prescribed to it directly also by EU law.[20] In practice, then, in its adjudication the Court has to balance between the need to safeguard the supremacy of EU law (also in relation to international law, in this case specifically to the European Convention), the constitutional interests of the Member States and the *raison d'être* of the European Union i.e. integration. The objective of the thesis is to analyze the way the Court strikes a balance between these various objectives in the two cases.

Before moving any further, it needs to be acknowledged that this argument is somewhat contradictory to the mainstream understanding of the ECJ. The abundant literature of the Court draws a picture of an extremely assertive actor. For instance, Kelemen explicitly argues that the ECJ does not care about forging an institutional balance, simply because it does not have to.[21] The ECJ's human rights adjudication has often been provided as a prime example of this behavior.[22] On the other hand, there are also researchers who argue that the EU Court is unwilling to rule against the core interests of the Member States. In

[18] Weiler, J.H.H. (1991). *The Transformation of Europe*. The Yale Law Journal 100: 2403-83; Burley, A.M. and Mattli, W. (1993). Europe before the Court: A Political Theory of Legal Integration. *International Organization*, 47 (1), pp. 41-76; Garrett, G., Kelemen, D.R. and Schulz, H. (1998). The ECJ, national governments, and legal integration in the European Union. *International Organization*, 52(1), pp. 149–76; Stone Sweet, A. (2004). *The Judicial Construction of Europe*. Oxford, Oxford University Press.

[19] As regards supremacy, one often cited case is the *Kadi* case (2013), in which the ECJ assessed whether the EU regulation giving effect to UNSC resolutions on freezing assets of people and groups associated with the Taleban movement was lawful, especially as regards the protection of human rights of the claimants, who stated that their property was seized without any lawful process. The ECJ finally reached a controversial conclusion, annulling the regulation and thus implicitly also reversing the UN set sanctions on Mr. Kadi and Al Barakaat Foundation – a decision strongly emphasizing the supremacy of EU law. Joined cases C-402 and 415/15 *P Kadi & Al Barakaat International Foundation v. Council & Commission*, ECLI:EU:C:2013:518.

[20] Art. 4 (2) TEU, Art. 52 (4) EU Charter.

[21] Kelemen, R. D. (2012). Introduction – the European Court of Justice and legal integration: Perpetual momentum? *Journal of European Public Policy*, 19 (1), pp. 1-7.

[22] See chapter 2.3.1.

the human rights context, Muir has recently found that despite their growing role in this field, EU institutions are still reluctant to actually making use of the fundamental rights discourse against the Member States.[23] The Court's rulings in *Achbita* and *Bougnaoui* also hint towards a cautious approach.

Substantively, the thesis contributes to understanding the Court's thinking and line of reasoning in non-discrimination. To this end, relevant EU law and ECJ case law related to non-discrimination will be discussed, as well as the ECHR (and ECtHR) stand on religious discrimination. Besides the substance and the outcome of the key decisions, methodologies and key principles of the ECJ and ECtHR in non-discrimination will be shortly explained. After that, the two cases will be presented and analyzed both from legal and institutional perspectives, considering how the Court's institutional positioning has affected its judicial reasoning and conclusions in the two cases.

Finally, it needs to be clarified that the primary aim of the thesis will be neither praising nor criticizing the Court's decisions in *Achbita* and *Bougnaoui*, but rather explaining them from an institutional point of view, which, for its part, is closely related to the history of European integration in general and the EU Court in particular. Therefore, the thesis begins with a short introduction to the history of European integration, with a special focus on the role of the EU Court in that process.

[23] Muir, E. (2014), pp. 25-37.

2 The Court of Justice in the EU structure

The chapter begins with a short introduction to the history European integration, clarifying the specificities of the European Union as a legal system. For this purpose, key principles and methods of EU law will be explained.

An important part of this chapter is outlining the role of the ECJ in the EU structure. This is something that especially political scientists have been interested in for decades. Much of this research has focused on the ECJ's alleged role in promoting integration through adjudication – through interpreting the Union (previously Community) law in an expansive manner. The claim has been exceptionally strong in areas touching upon fundamental rights and non-discrimination. On the other hand, there are researchers who have argued that the ECJ is incapable of taking expansive decisions without the acceptance of the Member States.

While giving credit to both of these views, the chapter argues for an institutional understanding of the ECJ's role, emphasizing not only its task as the ultimate guardian of EU law, but also its willingness to respect the institutional balance of the Union. From this perspective, the chapter argues – in line with Moorhead – that in its decision-making, the Court aims at sustaining the supremacy of EU law (also in relation to the ECHR), in a manner consistent with the Member States' constitutional requirements, while also advancing the project of European integration. This is by no means an easy task, and requires careful balancing.

The chapter ends by clarifying the relationship between the ECHR and EU law, which has changed since the entry into force of the Lisbon Treaty. The changes brought by Lisbon accentuate the need to investigate the EU Court also as a human rights adjudicator, especially in comparison with the Strasbourg Court.

2.1 Introduction to the European Union as a legal system

2.1.1 A short history of European integration

European integration has its roots in the two devastating world wars, waged between the years 1914-1918 and 1939-1945. The latter ended in the demise of the Nazi Germany, but also led to the emergence of the Cold War. Creation of the European Coal and Steel Community (ECSC) in 1951 – the first predecessor of the European Union – relates to both of these developments. The founding states of the ECSC (France, Germany, Italy, Belgium, the Netherlands and Luxembourg) agreed to administer their coal and steel resources under an international agreement, to reap the economic benefits of a common market of these materials. Politically, however, the underlying idea was to control the coal and steel production of Germany, to prevent its rearmament.[24]

In the beginning, the focus of European integration was on economy. A key step towards this objective was the signing of the Treaty of Rome in 1957, establishing the European Economic Community (EEC), which created a single market for goods, services, labor and capital across the EEC Member States (France, Germany, Italy, Belgium, the Netherlands and Luxembourg). The same states were also signatories to the Euratom Treaty (European Atomic Energy Community). The Treaty of Rome continued to provide the legal framework for the Community for almost 30 years.[25]

Over time, the level of ambition rose. The increasing substantive areas of the Community competence reflect this development. The additions of the Single European Act (entering into force in 1986) covered i.a. cooperation in economic and monetary union, social policy, economic and social cohesion and environmental policy. The Maastricht Treaty (entering into force in 1993), for its part, added the Community competence in areas such as public health, consumer protection and development cooperation. The Amsterdam Treaty (entering into force in 1999) introduced a new provision that conferred legislative competence on the Community to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[26] This provision served as

[24] Craig, P. (2014). *Development of the EU*, pp. 9-13. In Barnard, C. and Peers, S. (eds). *European Union law*. Oxford, United Kingdom: Oxford University Press, pp. 9-35.
[25] Ibid, pp. 13-16.
[26] Ibid, pp. 20-23.

the legislative basis for the two non-discrimination directives enacted in 2000, examined in the context of cases *Achbita* and *Bougnaoui*.

The Lisbon Treaty (entering into force in 2009) was a result of years of bargaining. It was preceded by a failed attempt to adopt a Constitutional Treaty for the Union in the beginning of the 21st century, as well as the approval of the EU Charter of Fundamental Rights in 2000.[27] Substantively, the Lisbon Treaty draws heavily on both of these documents: it puts to the forefront the values on which the EU is based, elevates the Charter of Fundamental Rights to the position of primary law, and obliges the Union to accede to the European Convention.[28] Noteworthy is also the fact that along with the Lisbon Treaty, the ECJ received full powers to control the legislative acts also in Justice and Home Affairs (the former third pillar).[29] From human rights perspective, these changes are crucial and form an important background to this thesis: fundamental rights have clearly been lifted to the forefront of EU law.

2.1.2 Direct effect and supremacy of EU law

The European Union as a legal system is a much explored topic, especially in European and American research circles. Much interest has been devoted to the question whether it is a *sui generis* legal system i.e. something between international and municipal legal systems, or whether it is – despite its peculiarities – just another form of international law.[30] Whatever the answer, there a few key principles that are distinctive to EU law. They also form the core of the ECJ's toolbox, which is why they warrant to be presented here: the principles of 'supremacy' and 'direct effect'.

[27] Ibid, pp. 25-27.

[28] Piris, J. (2010). *The Lisbon Treaty: A legal and political analysis*. Cambridge [UK]; New York: Cambridge University Press, p. 71. See also Art. 6 (1-2) TEU.

[29] Ibid, pp. 188-189.

[30] Esim. Weiler, J.H.H. (1991), pp. 2418-2422; Moorhead (2014), pp. 108-111; Waele, H. d. (2010). The Role of the Court of Justice in the European Integration Process. A Contemporary and Normative Assessment, p. 8. *Hanse Law Review; The E-Journal on European, International and Comparative Law, 6*, pp. 3-26.

In the EU context, the principle of direct effect originates from the case *Van Gend en Loos*[31], in which a Dutch company complained about the Dutch Tax Authority's *(Nederlandse Administratie der Belastingen)* decision leading to an increased tariff on imports from West Germany. The company (*Van Gend en Loos*) objected to this measure and claimed that it constituted a violation of Article 12 of the Treaty of Rome (i.e. the EEC Treaty), which stated that Member States must refrain not only from introducing between any new customs duties within the Community, but also from increasing those they already apply.[32]

In its ground-breaking decision the ECJ established that provisions of the Rome Treaty were capable of creating legal rights that could be enforced by both natural and legal persons. According to the Court, the Community constituted "a new legal order of international law", the subjects of which comprised not only of Member States, but also of their nationals.[33] In practice, this meant that Community law could confer rights also directly on individuals, which the courts of the Member States had to enforce. To many researchers, this decision stands at the heart of the European Union's human rights mandate: the possibility for private individuals to claim rights against the Member States has formed the EU into the rights-based system that it is today.[34]

Costa v. ENEL further cemented the Court's thinking on the direct effect of Community law.[35] However, *Costa v. ENEL* was important from another perspective, too. In the decision, the ECJ clarified the relationship between EU law and domestic law, enshrined in the principle of supremacy (or primacy as it is also called). In the decision, the Court stated that the EEC Treaty had created its own legal system which automatically had become an integral part of the legal systems of the Member States and which their courts

[31] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*.
[32] Art. 30 TFEU.
[33] *Van Gend en Loos* (Grounds of judgment, Section II B – On the substance of the Case).
[34] De Vries S. A. (2017). *The Charter of Fundamental Rights and the EU's 'creeping' competences: does the Charter have a centrifugal effect for fundamental rights in the EU?, p. 62.* In Douglas-Scott, S., Hatzis, N., eds. (2017). *Research Handbook on EU Law and Human Rights*. Northampton, MA: Edward Elgar Publishing Limited.
[35] Case 6/64, *Flaminio Costa v. ENEL*. See also de Witte, B. (2011). *Direct Effect, Primacy and the Nature of the Legal Order,* p. 328. In Craig, P. and de Búrca, G., eds. (2011). *The Evolution of EU Law*. Oxford: Oxford University Press, pp. 323-362.

were therefore bound to apply. Consequently, it was unacceptable for the Member States to take legal measures inconsistent with that legal system.[36]

ECJ has justified the establishment of the two principles by arguing that it automatically emanates from the nature and spirit of EU law that it has to assume a higher position from that of national law. Was it not the case, the Member States could determine their position vis-à-vis EU law by themselves. In this scenario, the effectiveness of EU law would be compromized.[37] In the context of this thesis, it is to be noted that in its case law the ECJ has rejected an interpretation that the Member States could provide a higher standard of human rights protection that that provided by EU law. The justification is that such a situation would undermine the supremacy of EU law.[38]

Taken into consideration these developments, it is no wonder that to many researchers the underlying thread in the EU Court adjudication is expansiveness. The Court has shown "extreme self-confidence in changing just some general principles in some treaties to 'a new legal order', which we now know as European Union law".[39] As summarized by Tamm, the EU Court has conceived of itself as part of the European project and has cemented its position in this project – in particular for the purposes of this project – by interpreting very broadly the provisions that brought it into being.[40]

2.2 The institutional role of the ECJ

[36] *Costa v ENEL* (The Grounds for judgment, on the submission that the court was obliged to apply the national law).

[37] Ellis, E. and Watson, P. (2013). *EU anti-discrimination law* (2nd edition). Oxford: Oxford University Press, p. 47. The principle of effectiveness (*effet utile*) – explicitly outlined by the Court in Case C-213/89 Factortame, para 20 – necessitates that national courts set aside any provision of a national legal system and any legislative, administrative or judicial practice, which might impair the effectiveness of EU law. See also Hofmann, H. CH. (2014). *General principles of EU law and EU administrative law*, p. 199. In Barnard, C. and Peers, S., eds. (2014). *European Union Law*. Oxford, United Kingdom: Oxford University Press, pp. 196-225.

[38] Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, paras 56-58. See also Douglas-Scott, S. (2011), pp. 675-676.

[39] Tamm, D. (2013). The History of the Court of Justice of the European Union Since its Origin, p. 11. In Bot, Y., Levits, E. & Rosas, A. (2013). *The Court of Justice and the Construction of Europe: Analyses and perspectives on sixty years of Case law*. Hague, the Netherlands: T. M. C. Asser Press, pp. 9-36.

[40] Ibid, p. 14.

2.2.1 The Court of Justice of the European Union

The European Court of Justice[41] was founded in 1952 as a court of the European Coal and Steel Community (ECSC). The adoption of the Treaty of Rome (1957) and thus the creation of the European Economic Community (EEC) widened the mandate of the Court to cover also the new communities. An important addition in the Rome Treaty to the Court's mandate was a possibility of a preliminary ruling, which in the course of the years has become perhaps the Court's most important tool for the development of the European Union law.[42]

The core task of the Court of Justice of the European Union is to ensure that in interpretation and application of the Treaties the law is observed.[43] In order to do that, it reviews the legality of the acts of the EU institutions, ensures that the Member States comply with obligations under the Treaties, and interprets EU law at the request of the national courts (through preliminary rulings, as regulated under Art. 267 TFEU). The ECJ also has jurisdiction in actions for annulment of a measure, such as a regulation, directive or decision.[44]

The judicial architecture of the Court, which has its seat in Luxembourg, has changed considerably in the last two decades. In fact, nowadays the Court of Justice of the European Union consists of several courts: the Court of Justice, the General Court (established in 1988 as the Court of First Instance) and specialized courts.[45] The thesis focuses on the activities of the supreme court in this hierarchy i.e. the Court of Justice (previously the European Court of Justice).

In principle, there is no hierarchical relationship between the EU Court and national courts, which have the last say in matters falling under their jurisdiction. The EU Court

[41] The official name of the Court has changed during the years, but for the sake of clarity, it will be called 'the ECJ' or just 'the EU Court' throughout the paper. See also Article 19 TEU and further information below.
[42] Tamm, D. (2013), pp. 19-20. See also Arnull, A. (2006). *The European Union and its Court of Justice* (2nd edition). Oxford: Oxford University Press, p. 33.
[43] Art. 19 (1) TEU.
[44] Official site of the EU Court [https://curia.europa.eu], visited on February 2, 2018; Art. 19 TEU, Arts 251-281 TFEU.
[45] Art. 19 TEU.

has the final say only in issues related to interpretation and application of EU law. However, in practice it is sometimes difficult to draw the line between matters falling under each of these jurisdictions, which makes the relationship between the EU Court and national courts more complicated than it might first appear. Quantitatively, national courts are the main interpreters of EU law.

Not only have the judicial architecture and the procedure of the Court changed, so has the diversity of cases brought before it. Since the entry into force of the Lisbon Treaty, the EU Court has increasingly referred to the provisions of the Charter for Fundamental Rights.[46] This is due to the developments briefly explained above: the accentuated fundamental rights focus of the Lisbon Treaty (including the binding force of the Charter), the expanding scope of the EU's competences and the extension of the Court's jurisdiction by the Lisbon Treaty.[47] All these developments have led to an increased importance of the ECJ as a human rights adjudicator.

2.2.2 The EU Court as the *primus motor* of European integration

As briefly mentioned above, there has been much scientific interest in exploring the ECJ's role in European integration. Many researchers have concluded that the Court's adjudication has been an important factor contributing to legal integration within the European Union.[48] On the other hand, there are researchers who emphasize the power of the Member States to influence the decision-making of the EU Court. Especially in constitutionally delicate issues, some say, the Court does not dare to step on the toes of the Member States.

Theoretically, neo-functionalists and intergovernmentalists have promoted fundamentally different views on the role of the ECJ in the integration process: the former have argued that the EU Court can almost independently pursue the integration agenda,

[46] de Búrca, G. (2013), p. 169
[47] de Búrca, G. (2013), p. 170.
[48] Weiler, J.H.H. (1991). The Transformation of Europe. *The Yale Law Journal* 100: 2403-83; Burley, A.M. and Mattli, W. (1993). Europe before the Court: A Political Theory of Legal Integration. *International Organization*, 47 (1), pp. 41-76; Garrett, G., Kelemen, D.R. and Schulz, H. (1998). The ECJ, national governments, and legal integration in the European Union. *International Organization*, 52(1), pp. 149–76; Stone Sweet, A. (2004). *The Judicial Construction of Europe*. Oxford, Oxford University Press.

while for the latter it has no independent influence on integration. Burley and Mattli provided the first neo-functional arguments about the ECJ. They called it a "hero" that "signals and paves the way [...] on which the political actors can further integration".[49] Their research was in many ways continuation to the seminal work of Weiler, recognizing the key role of the EU Court in the constitutionalization of Community law.[50] Later on, the ECJ's role as the driving force of integration has received extensive research focus.[51]

In contrast, the intergovernmentalist strand argues that the EU Court wants to avoid ending up in a situation where its decisions are contested by the Member States. This has led some researchers to argue that the Court is in fact nothing but a puppet of influential Member States – a judicial agent implementing the decisions of the political principals behind the scenes. In the beginning of the 1990's, Garrett went as far as to argue that the Court has no autonomous influence whatsoever on integration since its decisions are consistent with the preferences of France and Germany.[52] More recently, Carrubba and Gabel as well as Larsson and Naurin have claimed that the preferences of the Member State governments have a systematic and substantively important impact on ECJ decisions.[53] In the context of human rights adjudication, de Búrca has argued that the ECJ's focus is so heavily on ensuring the acceptance of its judgments to the national courts of the Member States, that it seems for the most part unconcerned about the impact and influence of its rulings.[54]

Based on these examples, it is clear that the outright acceptance of the Member States' interests by the ECJ is far from self-evident. On the other hand, a politically blind

[49] Burley, A.M. and Mattli, W. (1993), p. 41, p. 48.
[50] Weiler J.H.H. (1991). *The Transformation of Europe*. The Yale Law Journal, 100: 2403-83.
[51] See for instance, Garrett G. (1995). The Politics of Legal Integration in the European Union. *International Organization,* 49 (1), pp. 171-81; Stone Sweet, A. (2004); Alter, K.J. and Meunier-Aitsahalia, S. (1994). Judicial politics in the European Community: European integration and the pathbreaking "Cassis de Dijon" decision, *Comparative Political Studies,* 26 (4); Garrett, G., Kelemen, D.R. and Schultz, H. (1998).
[52] Garrett, G. (1992). International Cooperation and Institutional Choice: the European Community's Internal Market, p. 558. *International Organization,* 46 (2), pp 533-560.
[53] Carrubba, C. J. and Gabel, M. (2008). Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice. *American Political Science Review*, 102 (4), pp. 435-452; Larsson, O. and Naurin, D. (2016). Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU. *International Organization*, 70 (2), pp. 377-408.
[54] de Búrca, G. (2013), p. 184.

expansiveness does not seem probable either. A more plausible argument would thus seem that both neo-functionalism and intergovernmentalism include important elements of truth, but neither of them is sufficient on its own to explain the multifaceted reality. For sure, bold decisions of the ECJ need support by the Member States to have long-term impact. However, in practice the Court also has the power to shape integration even against the wishes of the Member States. Against this background, the thesis argues that a more comprehensive approach might be useful in understanding the EU Court's line of reasoning.

2.2.3 Towards an institutional approach

In order to build a more comprehensive view on the ECJ's thinking, the thesis relies on institutional understanding of judicial decision-making and its role in European integration. The approach was first presented by Mann in the 1970's.[55] Mann emphasized the institutional context the Court operated in, which required a certain kind of positioning from the ECJ. Reaching the right balance between the legislative, executive and judicial function – in other words the "responsible exercise of constitutional power" – was important.[56] Sometimes this required judicial restraint, sometimes activism.

More recently, Moorhead – relying besides Mann also on MacCormick[57] and Weinberger[58] – has investigated the institutional role of the EU Court. For the purposes of this thesis, the key argument of Moorhead is that the integration objective forms one of the foundational values of the European Union.[59] It is thus one of the values guiding the functioning of the Union in general, and its Court in particular. Moorhead admits that it is an objective that is nowhere explicitly mentioned in the Treaties, yet the Union is committed – in a foundational sense – to European integration. A factor attesting to this

[55] Mann, C. J. (1972). *The function of judicial decision in European economic integration*. The Hague.
[56] Ibid, p. 151.
[57] MacCormick, N. (2007). *Institutions of law: An essay in legal theory*. Oxford: Oxford University Press.
[58] Weinberger, O. (1991). *Institutionalist Theories of Law*. In Amselek, P. & MacCormick, N. (eds). *Controversies about Law's Ontology*. Edinburgh University Press, Edinburgh.
[59] Moorhead, T. (2014), p. 8.

argument is the wording of Article 3 TEU, referring to the legally mandatory character of the Union (political) objectives mentioned therein.[60] Moorhead continues:

> "[F]rom the perspective of the Court of Justice, the political objectives found in the Treaties are precisely those matters to which the 'hard' or precise legal provisions of the Treaties are directed to achieve. *All* legal regulation arising under the Treaties is directed in some way to the achievement of the social, economic and political ideals of European integration."[61]

From this perspective, Moorhead presents the key components of the European Union legal order: the Court aims at institutionally balanced decisions; sustaining and (where possible) developing the principle of supremacy of EU law, in a manner consistent with the Member States' constitutional requirements, while also advancing the project of European integration.[62]

This is an important point and theoretically the key idea informing this thesis. The institutional task of the Court is not only ensuring that the Treaty objectives are achieved but also safeguarding the stability of the Union project.[63] This is to suggest that the Court aims at promoting integration, but not at any cost. Indeed, Moorhead argues that the EU Court fully acknowledges that it must be able to articulate legal demands in a manner viewed legitimate by its 'institutional partners' in the European project, including the EU Member States, because in practice the ability of the ECJ to promote the Treaty objectives depends on the will of domestic actors to cooperate.[64]

This is why, in fact, the EU Court has not been as 'activist' as it could have been, taking into account the extremely wide mandate given to it by the Treaties. According to

[60] Article 3 (3) TEU: "The Union *shall* establish an internal market. [---] It *shall* promote economic, social and territorial cohesion, and solidarity among Member States. [---]" (emphasis added)
[61] Moorhead, T. (2014), p. 119.
[62] Ibid, p. 8.
[63] Ibid, p. 64.
[64] Ibid, pp. 11, 121. This also brings us back to the seminal article of Weiler, briefly referred to above. The article has often been labelled as a predecessor of neo-functionalism, emphasizing the role of the ECJ in furthering European integration. For the purposes of this thesis, however, the political dynamics Weiler suggests to lay behind this action is more important than the action *per se*. In his article, Weiler fully recognizes the political context in which the Court operates, and even highlights their interdependence. In fact, the main theoretical argument of the article (i.e. the exit and voice dichotomy) is conditioned by that context. Weiler J.H.H. (1991). *The Transformation of Europe*. The Yale Law Journal, 100: 2403-83, pp. 2408-2409, 2431.

Moorhead, even the doctrine of supremacy has been utilized by the ECJ in a restricted manner – in a way the Court seems institutionally possible.[65] For sure, many ECJ decisions have aroused criticism in the Member States. However, from an institutional perspective, dissatisfaction with the content of a single ruling needs to be conceptually separated from putting into question the viability of the EU Court altogether. The Court has proven to be a highly esteemed legal actor, which is reflected in the overall respect for its legal demands within the Union.[66] From another angle it could be argued that the Member States have not questioned the *raison d'être* of the Union and its high court, even though they have not always been satisfied with the ways the Court implements its mandate.

From an institutional point of view, thus, it is important to recognize that the EU Court is an autonomous but not an isolated organization: it operates neither in a legal nor a political vacuum. In a way, this makes the Court vulnerable to the Member States' political aspirations. However, it is one thing to argue that the EU institutions engage in an active discussion with each other on various topics, and another to argue that the Court passively adopts the views of the Member States (possible even under direct pressure). Perhaps it could be argued, as Hatzopoulos does, that this type of inter-institutional dialogue is in fact useful, by functioning as a guarantee of the constant development of EU law.[67]

In conclusion, it can be argued that the EU Court operates in a fundamentally different context than human rights tribunals, such as the European Court of Human Rights, or even domestic constitutional courts. In its adjudication, the EU Court needs to take into account a multiplicity of factors, including the objective of European integration as well as the need to avoid systemic clashes between Luxembourg and the national legal frameworks. In practice this leads, as Moorhead argues, to the EU Court's interpretive

[65] Moorhead, T. (2014), pp. 121-122.
[66] Moorhead, T. (2014), pp. 61-62.
[67] Hatzopoulos, V. (2013). *Actively talking to Each Other: The Court and the Political Institutions*. In Dawson, M. & de Witte, B. & Muir, E., eds. (2013). *Judicial Activism at the European Court of Justice*. Cheltenham: Edward Elgar.

logic being very dynamic, "[---] the 'degree' of integration in any given judgment varying as a result of complex array of political, legal and institutional considerations."[68]

2.3 Human rights in EU law and jurisprudence

2.3.1 Human rights jurisprudence as an instrument of integration

Before moving forward, in order to better understand the need to study the EU Court as a human rights adjudicator, especially in the post-Lisbon era, it is necessary to cast some light on the history of human rights in EU law and the EU Court's jurisprudence. As briefly mentioned in the introductory chapter, in the beginning, human rights considerations did not play any role in the European project. The EEC Treaty included no sections on fundamental rights because the founders did not see them relevant to a treaty with mainly economic aspirations. They also wanted to avoid parallel structures, taking into account the fact that all EEC members already were signatories to the European Convention of Human Rights (ECHR).[69]

During the first decades of existence of the European Communities, the protection of human rights mainly developed through the ECJ case law, often with some pushing by the Member States.[70] The first often mentioned case is *Stauder* (1969), in which the ECJ classified fundamental rights as "general principles of Community law".[71] The *Internationale Handelsgesellschaft* (1970) further affirmed this position, in which the Court famously claimed that the respect for fundamental rights formed an "integral part of the general principles of law" protected by the Court.[72] Arnull explains this development by arguing that the general principles doctrine offered the EU Court a convenient way of reconciling the need to protect fundamental rights, as dictated by the Member States' constitutions, with the doctrine of supremacy. Significant gaps between domestic legal orders and Community provisions could have led to disregard for

[68] Moorhead, T. (2014), p. 128.
[69] Douglas-Scott, S. (2011), pp. 647-648.
[70] Douglas-Scott, S. (2011), p. 649.
[71] Case 26/69 *Stauder v. City of Ulm,* Grounds of judgment, paragraph 7.
[72] Case 11/70 *Internationale Handelsgesellschaft*; Grounds of judgment, paragraph 4.

Community law.[73] A system of protection of fundamental rights was thus gradually built up by the Court based on the constitutional principles of the Member States but also on international conventions[74], of which the European Convention has been referred to by the EU Court as the most significant.[75]

By the Millennium, several Member States had started to advocate for both full incorporation of fundamental rights into the TEU and the EU accession to the ECHR. At the Cologne European Council in 1999, the establishment of the EU Charter for Fundamental Rights was agreed upon, and finally adopted a year after in Nice.[76]

2.3.2 Relationship between EU law and the ECHR

The development culminated into the adoption of the Treaty of Lisbon, which elevated the Charter for Fundamental Rights to the position of primary law, but also legally obliged the Union to accede to the European Convention on Human Rights. This created growing expectations as to the increasing coherence between the two human rights regimes. Even before Lisbon, the accession of the European Union to the ECHR had been a topic for debate for many years. In its opinion 1/94 from 1994, the ECJ had found that the European Community at that time lacked the competence to accede to the Convention.[77] The situation, however, had changed with the entry into force of the Lisbon Treaty. It could

[73] Arnull, A. (2006). *The European Union and its Court of Justice* (2nd edition). Oxford: Oxford University Press, pp. 181-182.

[74] Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities,* para 13.

[75] Joined cases 46/87 and 227/88 *Höchst v. Commission*, para 13: "The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950… is of particular significance in that regard."

[76] Chalmers, D. and Tomkins, A. (2007). *European Union public law: Texts and materials*. Cambridge: Cambridge University Press, p. 246-249.

[77] Opinion 2/94 of the EU Court: Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, paras 34-35, EU:C:1996:140.

no longer be argued that the Union lacked the competence to proceed: on the contrary, it was now legally obliged to do that.[78]

Despite this, with its opinion 2/13, the ECJ once again rebutted the accession agreement, criticizing it for not being compatible with the autonomy requirement of EU law. More specifically, the EU Court saw three main problems with the draft agreement: First, it did not reconcile the differing methodologies of the ECHR and EU law on the protection of human rights[79]; second, it undermined the principle of mutual trust between the EU Member States[80]; and third, the mechanism established by Protocol 16 to the ECHR could hamper the effectiveness of the preliminary ruling procedure.[81] It was apparent that the EU Court saw the accession shaking the *modus operandi* of EU law, undermining its autonomy and effectiveness. To the followers of the EU Court, there was nothing new in the argumentation. The Strasbourg Court, for its part, was openly disappointed in the ECJ's unfavorable stance.[82]

However, even though the accession process is still on hold, the importance of the Convention for EU law has already changed. This is due to Article 52 (3) of the EU Charter, now part of EU primary law, which provides that the meaning and the scope of those rights in the Charter, which correspond to rights guaranteed by the Convention are the same as those in the Convention.[83] Weiß adds that according to the explanations of Article 52 (3), the meaning and the scope of the Convention rights are to be determined

[78] TEU 6 (2): "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

[79] [79] Opinion 2/13 of the EU Court: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, paras 188-190. The underlying problem for the EU Court seems to be that the Contracting Parties to the ECHR are allowed to provide a higher standard of protection of fundamental rights than the ECHR provides, if they so wish. This is not the case under EU law (see *Melloni*, para 60).

[80] Opinion 2/13 of the EU Court: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, paras 191-195.

[81] Opinion 2/13, para 197.

[82] Council of Europe: Annual Report 2014 of the European Court of Human Rights, p. 6.

[83] Article 52 (3) EU Charter: "In so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

not only by their wording, but also by the Strasbourg Court case law.[84] From the perspective of EU law, this is a significant issue. With the provision, the EU legislature clearly strives for harmonization between the two human rights regimes, which is quite remarkable taking into account the apparent tension between full coherence of the two regimes and the autonomy of EU law, a prerequisite for European integration. One could assume that for the EU Court the latter weighs more.

To prove the point, the provision has indeed turned out to be difficult to implement. According to legal researchers, even in its post-Lisbon decisions the EU Court has been reluctant to draw on the ECHR or the Strasbourg Court case law.[85] At most, the EU Court's case law is divided on the issue: with some decisions, it leans towards the ECHR regime, but with others, it seems to ignore that altogether.[86]

Finally, the last phrase of Article 52 (3) EUCFR deserves specific attention ("*The provision shall not prevent Union law providing more extensive protection*"). It is unclear whether the EU Court has ever used this provision in its decision to justify a higher level of protection than that provided by the ECHR, but at least during this research process no such cases were found. In the case *PPU*, the issue is mentioned but without a substantive impact on the conclusion.[87] However, the provision is significant in the context of this thesis. It is referred to in her opinion by Advocate General Sharpston, advising the EU Court on case *Bougnaoui*. [88] Apart from the opinion of AG Sharpston, the issue remains undiscussed in the two cases.[89]

[84] Weiß, W. (2011). Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon, p. 81. *European Constitutional Law Review,* 7 (1), pp. 64-95.
[85] See for instance Callewaert, J. (2014). *The accession of the European Union to the European Convention on Human Rights*. Strasbourg, France: Council of Europe Publishing, pp. 11-13.
[86] Cases that acknowledge the interdependence include, among others, Case C-279/09 DEB, para 35, and Case C-92/09, C-93/09 Volker and Markus Schecke GbR, para 51. On the other hand, for example Callewaert notes the recent trend of the ECJ to advocate a division of labor between the two regimes, thus seemingly arguing for their incompatibility. On some occasions, the EU Court has ignored the EHCR altogether. Callewaert, J. (2014), p. 11.
[87] Case C-400/10 PPU, J. McB. v. L.E., para 53.
[88] Opinion of Advocate General Sharpston on Case C-188/15, ECLI:EU:C:2016:553, para 64.
[89] See chapter 4.

3 Non-discrimination in European law and legal practice

Non-discrimination is one of the most frequently protected principles of international human rights law. It is often guaranteed in the form of a general non-discrimination clause in the enjoyment of human rights, but sometimes also as an independent principle.[90] In the European context it is covered by both the European Convention on Human Rights and EU law, as well as domestic legal systems.

Strasbourg and Luxembourg perspectives to the issue are slightly different, however. The objective of this chapter is to compare the two legal regimes in this matter, in order to gain understanding of non-discrimination as a human rights issue (the Strasbourg framework) in comparison to non-discrimination as a matter of EU law. The comparison will open up further avenues to assessing the EU Court as a human rights adjudicator.

The chapter starts by first exploring the EU non-discrimination framework followed by a brief introduction to the ECHR framework. It also shortly discusses the ECtHR Article 9 case law, specifically as regards religious manifestation. This is important as the EU Court was faced with the question for the first time in *Achbita* and *Bougnaoui*, whereas the Strasbourg Court already had reached several conclusions in similar matters. Finally, the two non-discrimination regimes will be compared with each other, in order to be able to better contextualize the EU Court's approach in *Achbita* and *Bougnaoui.*

3.1 Non-discrimination in EU law and legal practice

3.1.1 EU primary and secondary law

In the beginning, the EU (then EEC) legislators were mainly interested in equal treatment of different nationalities. The EEC Treaty (Art. 6) provided a general prohibition of any discrimination on grounds of nationality. In practice, however, the principle only applied

[90] Besson, S. (2012). Evolutions in Non-discrimination law within the ECHR and the ESC systems: it takes two to tango in the Council of Europe, p. 154. *The American Journal of Comparative Law*, 60 (1), pp. 147-180.

to EU citizens and in cross-border situations.[91] Another area at the focus was gender equality. The rationale was to prevent some of the EU Member States from gaining a competitive advantage by offering lower salaries or otherwise less favorable working conditions for women.[92]

When the Amsterdam Treaty entered into force in 1999, the EU gained the ability to take action to combat discrimination on various grounds. This competence led to the introduction of new equality directives: the Framework Directive[93] prohibiting discrimination in employment on several bases, and the Racial Equality Directive[94] prohibiting discrimination based on race or ethnicity in employment, but also in accessing the social security system, goods and services. Especially the latter constituted a significant expansion of the scope of non-discrimination under EU law. It recognized that to allow individuals to reach their full potential, it was essential to guarantee them equal access to education, health and housing.[95]

The main primary source of EU non-discrimination law are the Treaties, as amended during the decades. Article 2 TEU recognizes the elementary importance of equality as one of the founding values of the European Union.[96] Article 3 (3) TEU obliges the EU to combat social exclusion and discrimination, to promote both social and economic progress.[97] According to Ellis and Watson, the TFEU includes three different types of

[91] Bell, M. (2011). *The Principle of Equal Treatment: Widening and Deepening*, p. 612-613. In Craig, P. and de Búrca, G., eds. (2013). *The evolution of EU law* (2nd edition). Oxford; New York: Oxford University Press, pp. 611-639.

[92] European Agency for Fundamental Rights: Handbook on European Non-Discrimination Law (2018), pp. 10, 21, [https://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination], accessed on 21 March 2019.

[93] Council Directive 2000/78/EC of November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303, 02/12/2000 P. 0016 – 0022.

[94] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Official Journal L 180, 19/07/2000 P. 0022 – 0026.

[95] Handbook on European Non-Discrimination Law (2018), pp. 21-22.

[96] Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[97] Article 3 (3) TEU: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It

provisions important in this field: statements of principle or intent, provisions that convey substantive rights and provisions that authorize the institutions of the Union to make secondary legislation.[98] For instance, Article 8 TFEU states that in all its activities, the Union aims to eliminate inequalities and to promote equality. Article 10 TFEU – a new provision added by the Lisbon Treaty – further stress, that in defining and implementing its policies and activities, the Union aims at combatting discrimination. Bell argues that with these two articles the EU has established a policy of mainstreaming non-discrimination in all its policies and action.[99] In other words, it has not only constitutionalized the principle of non-discrimination in its primary law but also made it an objective of the Union throughout all policy areas.

Article 19 (1) TFEU needs to be specifically mentioned as it introduces the right for the Council, acting unanimously and in accordance with a special legislative procedure, after obtaining the consent of the European Parliament, to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[100] Article 19 is not a freestanding right, however. It cannot be invoked to challenge the legality of EU institutions or the Member States, but it rather serves as a legal basis, which permits the EU to act.[101]

To complement other primary law, the EU Charter of Fundamental Rights contains a list of human rights that the EU and its Member States are to respect in all their action. As mentioned above, the Lisbon Treaty granted the Charter the same legal status as the Treaties. As a result, EU institutions are now legally obliged to comply with the Charter, as are the EU Member States when implementing EU law.[102] Under the title 'Equality' (Articles 20-26), the EU Charter emphasizes the importance of the principle of equal

shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."

[98] Ellis, E. and Watson, P. (2013), p. 13.

[99] Bell, M. (2011). *The Principle of Equal Treatment: Widening and Deepening*, p. 630. In Craig, P. and de Búrca, G., eds. (2013). *The evolution of EU law* (2nd edition). Oxford; New York: Oxford University Press, pp. 611-639.

[100] Ellis. E. and Watson, P. (2013), p. 15.

[101] Speekenbrink, S. (2012). *European Non-Discrimination Law: A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue*. Utrecht University Repository (dissertation), p. 37.

[102] Art. 51 (1) EU Charter

treatment in the EU legal order. Specifically, Article 21 (1) contains a prohibition of discrimination on various grounds.[103]

One of the key characteristics of EU non-discrimination law is that it differentiates between direct and indirect discrimination. Definitions are provided by the relevant secondary legislation, where direct discrimination is defined as one person being treated "less favorably than other is, has been or would be treated in a comparable situation".[104] Indirect discrimination, for its part, takes place when "an apparently neutral provision, criterion or practice would put persons having a particular religion of belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons".[105]

Under EU law, a case of direct discrimination on grounds of religion or belief can only be justified under two different circumstances: First, if the nature of the particular occupational activities so insist[106], or second, if it is necessary for public security, for the maintenance of public order, for the protection of health or for the protection of the rights and freedoms of others.[107] Indirect discrimination, however, can be more easily justified. It can be accepted if it has a legitimate aim and the means of achieving that aim are appropriate and necessary.[108]

3.1.2 Case law of the ECJ in non-discrimination

[103] Art. 21 (1) EU Charter: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age of sexual orientation shall be prohibited."
[104] Directive 2000/78/EC, Art. 2 (a).
[105] Directive 2000/78/EC, Art. 2 (b).
[106] Directive 2000/78/EC, Art. 4 (1): "Notwithstanding Article 2 (1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement proportionate."
[107] Directive 2000/78/EC, Art. 2 (5). It is good to note that the wording of the directive closely resembles the wording of Article 9 (2) ECHR, setting the limits for the freedom of thought, conscience and religion under the European Convention on Human Rights.
[108] Directive 2000/78/EC, Art. 2 (b) (i).

As mentioned above, originally the principle of equal treatment (i.e. prohibition of non-discrimination) seems to have been merely instrumental in the European project. As Bell notes, equal treatment (of employees) and the objectives of cross-border free movement and integration of markets go hand in hand.[109] Another area that the EU (EEC) legislators were originally interested in was gender equality. However, the interest was extremely narrow, only covering the right to equal pay for equal work, due to its explicit protection by the EEC Treaty (Art. 119; now Art. 157 TFEU). This becomes clear in the ECJ decision in *Defrenne* (III), in which the EU Court famously recognized fundamental human rights as general principles of Community law, also adding that "there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights"[110]. Despite this, it concluded that besides remuneration the Community had no responsibility for supervising the observance of the principle of equality between men and women at work.[111]

Defrenne, however, was only the beginning of a larger, including legislative change. During the years following *Defrenne* the EU legislation was broadened, leading to a more general principle of sex equality in employment.[112] New legislation was consequently followed by further litigation: for instance, in *Dekker* (1990) the Court interpreted the original equal treatment Directive 76/207 to provide protection for pregnant women in access to employment.[113] In *Barber* (1991) the Court ruled that Article 119 EEC required equality in respect of occupational pension age.[114] In the *Grant* case (1998) the Court concluded that a refusal by an employer to permit a spouse of a homosexual employee the same benefits as other spouses were allowed to, did not constitute discrimination in the context of Article 119 EEC (or Directive 75/117).[115] As with *Defrenne*, however, the

[109] Bell, M. (2011), p. 611.
[110] Case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (Defrenne III), para 27.
[111] Defrenne III, para 30.
[112] Douglas-Scott, S. and Hatzis, N. (2017). *EU law and social rights*, pp. 502-504. In Douglas-Scott, S. and Hatzis, N, eds. (2017). *Research handbook on EU law and human rights*. Northampton, MA: Edward Elgar Publishing Limited, pp. 491-515.
[113] Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, para 1 (in the decision part)
[114] Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, paras 32, 35.
[115] Case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd*, para 50.

legislative gap was filled afterwards with new EU legislation prohibiting discrimination on grounds of sexual orientation.[116]

In the beginning, thus, the principle of non-discrimination constituted primarily an instrument of economic integration, but things have changed since. According to Bell, its contents now stretch "well beyond the minimum intervention required by a pure market integration rationale".[117] In fact, it is sometimes claimed to be one of the most expansive areas of EU human rights activity – an area where the ECJ has been most prudent to expand the legal competency of the European Union.[118] From this perspective, there are two post-Lisbon phenomena that warrant to be presented here.

First, as Douglas-Scott and Hatzis explain, after Lisbon the ECJ has for the first time declared an individual provision of a legal instrument invalid, as it was alleged to constitute an unlawful derogation from the principle of equal treatment between men and women.[119] To Douglas-Scott and Hatzis this example demonstrates the increased capability of the ECJ, based on the EU Charter and the increased fundamental rights focus of the Union, to review EU measures.[120]

Second, in *Kücükdeveci* (2010), the EU Court confirmed that prohibition of non-discrimination on grounds of age was a general principle of EU law. In some respect, the decision was continuation to *Mangold*, where the ECJ for the first time had recognized the existence of a general principle of equality with respect to age.[121] In *Kücükdeveci*, however, the Court made it perfectly clear that the general principle of EU law prohibiting discrimination in the field of employment was only "given expression" in Directive 2000/78.[122] In other words, the Court argued that non-discrimination, as a principle, was something beyond EU primary and secondary law, and it was this background the Court

[116] Douglas-Scott, S. and Hatzis, N. (2017), p. 503.
[117] Bell, M. (2011), p. 612.
[118] de Búrca, G. (2011). *The Evolution of EU Human Rights Law*, pp. 492-493. In Craig, P. P. and de Búrca, G., eds. (2011). *The evolution of EU law* (2nd edition). Oxford; New York: Oxford University Press, pp. 465-497.
[119] Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres*, paras 31-34.
[120] Douglas-Scott, S. and Hatzis, N. (2017), p. 505.
[121] Case C-144/04 *Werner Mangold v Rüdiger Helm*, paras 74-75.
[122] Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*., paras 20, 27.

reflected in its decision, not only the wording of the Directive. Furthermore, in Kücükdeveci, the ECJ did not confine it approach to the scope of employment law. On the contrary, it explicitly referred to the entire scope of EU law.[123] The decision therefore arguably constitutes a significant expansion of the scope of EU law in this area.

3.1.3 Non-discrimination as a general principle of EU law

For the purposes of this thesis, it is necessary to give further attention to the general principles doctrine of the European Union, referred to above. Just like the doctrines of supremacy and direct effect, the general principles doctrine is an invention of the EU Court. According to Ellis and Watson, the EU Court created the general principles doctrine to serve as an interpretive tool, "to put flesh on the bones of the legal system".[124] From this perspective, general principles have a gap-filling function: they serve as bridge-builders between abstraction (posited law) and reality (the context in which the law is applied). As such, there is nothing extraordinary in them. On the contrary, one could argue that the existence of these type of interpretive tools is of crucial importance to functioning of any legal system.

However, to define the general principles doctrine simply as an interpretive tool does not make justice to its legal significance. Instead of just guiding on how to interpret EU legislative acts, the principles are legally binding as such on all EU institutions in the exercise of their competences. In practice, they are used by the EU Court as criteria against which it assesses the legality of EU acts.[125] To be perfectly clear, for the EU Court the (unwritten) general principles of EU law have a similar legal status as the (written) Treaty provisions.[126] This view has been spelled out by the ECJ for example in the *Grant*

[123] de Mol, M. (2011). The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?, p. 120. *Maastricht Journal of European and Comparative Law, 18* (1-2), pp. 109-135.
[124] Ellis, E. and Watson, P. (2013), p. 99.
[125] Hofmann, H. CH. (2014). *General principles of EU law and EU administrative law*, p. 203. In Barnard, C. and Peers, S., eds. (2014). *European Union Law*. Oxford, United Kingdom: Oxford University Press, pp. 196-225.
[126] Ellis, E. and Watson, P. (2013), p. 99.

case.[127] The Member States, too, are to respect the general principles when implementing the Union law.[128]

The general principles primarily derive from the laws of the Member States and international legal instruments, to which the Member States are signatories. The European Convention for Human Rights (ECHR) constitutes one of the most important of those sources.[129] Ellis and Watson argue that in establishing the general principles, the Court has assessed the degree of convergence among the different national systems. The more convergence there has been on a particular issue, the more likely the Court has been to find that a general principle of law exists.[130] From this perspective, one could argue that in fact the general principles of EU law are not something the EU Court has autonomously invented, but instead reflections of the legal traditions of the EU Member States.[131]

In the fundamental rights framework, the ECJ used the doctrine for the first time in 1969 in *Stauder*, in which it made clear that fundamental rights were part of the general principles of Community law, which the Court would protect.[132] In subsequent cases the Court clarified that it looked into constitutional traditions of the Member States[133] as well as relevant international treaties to which the Member States were signatories[134] in defining which fundamental rights formed part of the general principles of Community law. As mentioned above, the Court needed the general principles doctrine to fill the gaps in the Community legislation, but also to calm down the national courts (especially in

[127] C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd*., para 45: "[R]espect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts [---]."
[128] Ellis, E. and Watson, P. (2013) pp. 100-101.
[129] Joined cases 46/87 and 227/88 *Höchst v. Commission* [1989], para 13: "The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950… is of particular significance in that regard." See also Ellis, E. and Watson, P. (2013), p. 21, p. 102.
[130] Ellis, E. and Watson, P. (2013), p. 103.
[131] Hofmann, H. CH. (2014). *General principles of EU law and EU administrative law*, p. 203-217. In Barnard, C. and Peers, S., eds. (2014). *European Union Law*. Oxford, United Kingdom: Oxford University Press, pp. 196-225.
[132] Case 26/69 *Stauder v. City of Ulm* [1969] ECR 419; Grounds of judgment, paragraph 7.
[133] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.
[134] Case 4/73 *Nold* [1974] ECR 491, para 13.

Italy and in Germany), concerned about the level of fundamental rights protection offered by Community law.[135]

Finally, it is important to note that many of the rights and principles initially established under the ECJ case law have been later incorporated into positive law. This has not led, however, to abandoning of the general principles doctrine. On the contrary, under Article 6 (3) TEU, rights are also protected as general principles of EU law.[136] The approach adopted by the ECJ in *Kücükdeveci* proves that the Court is still using the general principles doctrine in its human rights adjudication.

3.2 The Strasbourg framework

3.2.1 Non-discrimination in the European Convention on Human Rights

The Council of Europe (CoE) was created in 1949 as a reaction to the stalemate of the newly established United Nations. It soon became clear that legally binding universal human rights instruments would not be available any time soon[137], which urged the European states to take action. They decided to create their own human rights instrument, the European Convention on Human Rights (ECHR), as well as a court to look after its implementation (the European Court of Human Rights, hereinafter the 'ECtHR' or the 'Strasbourg Court'). The focus of the ECHR is on civil and political rights.[138] Currently the ECHR is ratified by 47 states, including all EU Member States.[139]

[135] Spaventa, E. (2014). *Fundamental Rights in the European Union*, p. 229. In Barnard, C. and Peers, S., eds. (2014). *European Union Law*. Oxford, United Kingdom: Oxford University Press, pp. 226-254.
[136] Hofmann, H. CH. (2014). *General principles of EU law and EU administrative law*, p. 224. In Barnard, C. and Peers, S., eds. (2014). *European Union Law*. Oxford, United Kingdom: Oxford University Press, pp. 196-225.
[137] Due to the nascent Cold War and the division of the world in two competing blocks, it took almost two decades for the UN member states to draft the two international covenants deriving from the UDHR: the International Covenant for the Protection of Civil and Political Rights (ICCPR) and the International Covenant for the Protection of Economic, Social and Cultural Rights (ICESCR).
[138] Ellis, E. and Watson, P. (2013), p. 104.
[139] The official site of the Council of Europe [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures], accessed on 22 June 2019.

The protection against discrimination can be derived from three different sources in the ECHR: the substantive provisions, from Article 14, and from Protocol 12 to the Convention.

As far as the substantive provisions are concerned, Article 9 ECHR is of primary importance for this thesis, protecting the freedom of thought, conscience and religion. The language of the European Convention on Human Rights regarding the right to freedom of religion is in line with the ICCPR.[140] Art. 9 (1) ECHR recognizes that everyone has the right to freedom of thought, conscience and religion, and that this right also includes the right to manifest those beliefs. Art. 9 (2) prescribes that freedom to manifest one's religion or belief shall be subject only to such limitations that are dictated by law and are "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".[141]

Article 14 prohibits discrimination in the enjoyment of the rights and freedoms set out in the Convention[142]. In other words, it does not create an additional right, but only a principle that applies when the case at hand falls within the ambit of other rights of the Convention ("accessory character").[143] Although these rights need not to be violated for Article 14 to be invoked (autonomy of the principle), its violation will not be examined by the Strasbourg court when other rights in the Convention are regarded as being violated (subsidiarity of the principle).[144] Some researchers have criticized that the reliance of Article 14 on other substantive rights by the ECHR has limited its effectiveness.[145]

[140] ICCPR Art. 18.
[141] Art. 9 (2) ECHR.
[142] Article 14 ECHR: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
[143] Besson, S. (2012) pp. 156-157.
[144] Ibid, p. 157.
[145] Ellis, E. and Watson, P. (2013), pp. 105-106.

Protocol 12 (2000) to the ECHR, ratified by 20 Council of Europe Member States (of which only a handful are EU Member States)[146], expands the scope of the prohibition of discrimination to equal treatment in the enjoyment of any right, including rights under national law.[147] In other words, it provides for a general prohibition of discrimination, in contrast with the more limited provision included in Art. 14 ECHR. The protocol entered into force in 2005. So far, this protocol has been rarely used as a basis for decision.[148]

3.2.2 Non-discrimination in the ECtHR case law

Neither Article 14 nor Protocol 12 spell out the meaning of discrimination. In its case law, the ECtHR has stated that distinction is discriminatory if it "has no objective and reasonable justification" or if there is "no reasonable relationship of proportionality between the means employed and the aim sought to be realized."[149] ECtHR nowadays interprets the concept to cover both direct and indirect discrimination, in line with EU law (cross-fertilization). In ECtHR, there has been a clear increase in non-discrimination cases in recent years, especially after 2000 when the Strasbourg Court started to acknowledge also indirect discrimination.[150] The first case of application of Art 14 ECHR (to sex discrimination) only dates back to 1985[151], and half of the cases claiming violation of that Article have been decided since 2007.[152] In comparison to the ECJ, it is good to note that the majority of cases dealt with by the Strasbourg Court take place outside the realm of employment.[153]

As far as the protected grounds are concerned, the ECHR is explicitly – deliberately – undetermined about the possible grounds for discrimination. The treaty text (Art. 14 ECHR) reads in an open-ended manner: "The enjoyment of the rights and freedoms set

[146] The official site of the Council of Europe [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=6v5SRzTc], accessed 18 July 2018.
[147] Handbook on European Non-Discrimination Law (2018). Luxembourg: Publications Office of the European Union, p. 18.
[148] Ellis, E. and Watson, P. (2013), pp. 110-111.
[149] Besson, S. (2012), p. 167; *Koua Poirrez v France*, no 40892/98 (ECtHR 2003), para 46; *Belgian Linguistics*, no 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR 1968), para 10.
[150] *Thlimmenos v. Greece*, no 34369/97 (ECtHR 2000), para 44.
[151] *Abdulaziz, Cabales and Balkandali v The United Kingdom,* no 9214/80, 9473/81, 9474/81 (ECtHR 1985), para 83.
[152] Besson, S. (2012), p. 160.
[153] Speekenbrink, S. (2012), p. 121.

forth in this Convention shall be secured without discrimination *on any ground such as* sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status*" (emphasis added). In other words, the definition is open-ended, including no exclusive understanding of potential grounds for discrimination. The Strasbourg Court has underlined this open-endedness by saying that the list is "illustrative and non-exhaustive".[154]

In some cases, however, the ECtHR has concurred that only discrimination based on immutable personal characteristics matters.[155] Gerards offers a useful example of the Court's thinking in this regard: In the case of *Magee*, it found that a difference in the procedural rights of persons arrested and detained in England and Wales as compared to those arrested and detained in Northern Ireland did not amount to discrimination within the meaning of Article 14. This was because the difference of treatment could not be explained by personal characteristics of the detainees but on geography.[156] According to Gerards, these two lines of case law still exist in parallel.[157]

Furthermore, not all grounds for discrimination are equal to the ECtHR. Instead, it makes a distinction between 'suspect' and other grounds. According to the ECtHR, the justification for the distinction is that historically, certain groups have faced prejudice and social exclusion. Such prejudice may have resulted in legislative distortions, negatively affecting the realization of the potential of these people.[158] This is why the Court needs to be particularly alert regarding certain grounds. In a specific case, if it has a reason to believe that discrimination is based on one of the suspect grounds, the level of scrutiny becomes more intense. In those cases, the threshold for accepting justifications for the

[154] *Engel and Others v the Netherlands*, no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR 1976), para 72; *Rasmussen v Denmark*, no 8777/79 (ECtHR 1984), para 34.
[155] See for example *Kjeldsen, Busk Madsen and Pedersen v Denmark,* no. 5095/71, 5920/72, 5926/72 (ECtHR 1976), para 56.
[156] Gerards, J.H. (2013). The Discrimination Grounds of Article 14 ECHR, p. 105. *Human Rights Law Review*, 13 (1), pp. 99-123.
[157] Ibid, p. 102.
[158] *Alajos Kiss v Hungary*, no 38832/06 (ECtHR 2010), para 42.

discriminatory action also becomes higher.[159] At least gender, nationality, race, sexual orientation and religion are among the suspect grounds.[160]

Finally, in contrast with EU law, the non-discrimination regime of the ECHR provides an objective justification test both for direct and indirect discrimination.[161] Whereas EU law does not allow direct discrimination (apart from a few exceptions), for the Strasbourg Court even direct discrimination can be justified if it pursues an acceptable aim and is not disproportionate to that aim.[162] In this sense, ECtHR's view on discrimination is more lenient. As to indirect discrimination, both regimes share more or less the same approach.

3.2.3 Religious manifestation in Article 9 case law

Article 9 ECHR protects the freedom of religion or belief. It covers both internal (the private sphere) and external dimensions (i.e. public manifestation). However, as mentioned above, the right is not absolute. It is subject to limitations in cases where those limitations are "necessary in a democratic society" and have a legitimate aim (public safety, protection of public order, health or morals, and protection of the rights and freedoms of others). Furthermore, the limitations have to be prescribed by law.[163]

In practice, the methodology of the ECtHR starts with by assessing whether the state has interfered with a person's right to freedom of religion. This applies also to cases dealing with religious manifestation. According to for instance van Dijk et al, in Article 9 case law the Court has usually been rather reluctant to acknowledge an interference.[164] Instead, as White and Ovey state, the ECtHR has made a separation between manifestations that are "objectively necessary" and those that are necessary only according to the applicant

[159] *Alajos Kiss v Hungary*, para 42; *Kiyutin v Russia*, no 2700/10 (ECtHR 2011), para 64.
[160] Arnardóttir, O.M. (2015). Cross-fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights – the Case of the Discrimination Grounds under Article 14 ECHR. *Nordic Journal of Human Rights*, 33 (3), pp. 220-242.
[161] Speekenbrink, S. (2012), pp. 196-197.
[162] Besson, S. (2012), p. 167.
[163] Art. 9 (2) ECHR.
[164] van Dijk, P, van Hoof, F., van Rijn, A. and Zwaak, L. (2006). *Theory and Practice of the European Convention on Human Rights*, Antwerp: Intersentia, p. 762.

himself.[165] It goes without saying that the line between these two categories is arguable. In addition, the Strasbourg Court has made a distinction between cases where the inability to manifest religion is clearly due to state behavior, and those cases where it is, according to the Court, mostly attributable to the free choice of the applicant.[166] According to Sandberg, the ECtHR has been particularly strict concerning religious manifestation in the context of employment.[167] In those contexts it has often emphasized the free choice of the individual, signifying that applicants have the freedom to leave their job and seek employment elsewhere if they so wish (thus there being no interference).[168]

If, however, an interference with a person's freedom of religion is found, the burden of proof switches from the applicant to the respondent state. This means that the state has to be able to show that the restrictive measure it has taken is prescribed by law, it has a legitimate aim and it is proportionate to reaching that aim. Here, again, the ECtHR has usually been favorable to the respondent state. First, it has adopted a wide conception of what may constitute a legitimate aim. Article 9 (2) provides three general categories of legitimate aims (public safety; protection of public order, health and morals; protection of the rights and freedoms of others), but also other aims have been accepted as legitimate, often without explanation.[169]

Second, a national measure that limits religious manifestations should be "necessary in a democratic society". According to the ECtHR case law, there should be a "pressing social need" for something to be considered necessary.[170] Ultimately, the question culminates into to a proportionality test. In other words, an interference in one's freedom of religion must be no greater than what is necessary to addressing that pressing social need.[171] According to Speekenbrink, the proportionality test of Article 9 (2) is relatively lenient.

[165] White, R.C.A and Ovey, C. (2010). *The European Convention on Human Rights*, New York: Oxford University Press, p. 410.
[166] Evans, M.D. (2009). *Manual on the Wearing of Religious Symbols in Public Areas*. France: Council of Europe Publishers, p. 14.
[167] Sandberg, R. (2011). *Law and Religion*. United Kingdom: Cambridge University Press, p. 85.
[168] Vickers, L. (2008). *Religious Freedom, Religious Discrimination and the Workplace*. United States: Hart Publishing, pp. 87-88.
[169] Speekenbrink, S. (2012), p. 140.
[170] *Kokkinakis v. Greece*, no. 14307/88 (ECtHR 1993), para 49.
[171] Speekenbrink, S. (2012), pp. 140-141.

This is due to the wide margin of appreciation left to the Contracting States as to the relationship between religion and the state.[172] The heterogeneous stance of different European states on religion makes the Strasbourg Court unwilling to take the lead, which it has explicitly stated in its case law.[173]

This might explain the general non-interference policy of the ECtHR in Article 9 case law, referred to above, but also the fact that the Court has generally given the Contracting States much discretion on how to determine the limits of religious manifestation. According to Tonolo, this applies especially to the visibility of Islamic symbols.[174] Indeed, case law seems to give back up to the argument: In *Dahlab*, a school teacher was dismissed from a state-owned primary school in Switzerland due to wearing an Islamic headscarf. The Strasbourg Court ruled that the measure was "not unreasonable" taking into account that the pupils she had been teaching were aged between four and eight and thus extremely susceptible to external influences.[175] In *Sahin*, a Turkish university student was prohibited from attending her classes because she wore a headscarf.[176] ECtHR has confirmed several times since *Sahin* that schools are allowed to determine the dress code of their students, with the aim of safeguarding the rights and freedoms of others as well as public order.[177] As regards the use of religious headscarves in public, the Strasbourg

[172] Ibid, p. 141.

[173] *Otto-Preminger-Institut v. Austria*, no. 13470/87 (ECtHR 1994), para 50: "As in the case of 'morals', it is not possible to discern throughout Europe a uniform conception of the significance of religion in society… even within a single country such conceptions may vary. For that reason, it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference."

[174] Tonolo, S. (2014). Islamic Symbols in Europe: The European Court of Human Rights and the European Institutions, pp. 1-28. University of Milan, *Rivista Telematica*: [https://riviste.unimi.it/index.php/statoechiese/article/view/3765], accessed 12 May 2019.

[175] *Dahlab v Switzerland*, 42393/98 (ECtHR 2001), section "The law", para 1.

[176] *Leyla Sahin v Turkey*, no. 44774/98 (ECtHR 2005), paras 15-17 and 122-123.

[177] *Köse and 93 Others v Turkey*, no. 26625/02 (ECtHR 2006), p. 12; *Dogru v France*, no 27058/05 (ECtHR 2008), paras 5-8, 77-78; Information Note on the Court's case law no. 121 (summarizing e.g. cases *Aktas v. France*, no 43563/08, *Bayrak v. France*, no 14308/08, *Gamaleddyn v. France*, no 18527/08, *Ghazal v. France*, no 29134/08).

Court has also adopted a rather clear-cut view: a state is allowed to ban religious veils that cover the face, based on respect for the conditions of "living together".[178]

In *Eweida and Chaplin*, the two applicants – a British Airways employee (Ms Eweida) and a nurse (Ms Chaplin) – complained of their respective employers for prohibiting the wearing of Christian crosses at work. As regards the first applicant, Ms Eweida, the Court concluded that there had been a violation of Article 9. The Court argued that the employer's wish to present a certain corporate image was not as important as Ms Eweida's desire to manifest her belief. The Court added, however, that the fact that the cross worn by Ms Eweida was small and discreet, affected the Court decision. As far as the second applicant (Ms Chaplin) was concerned, the Court ruled that clinical safety weighed more in the balance than Ms Chaplin's wish to wear a religious cross. Accordingly, the hospital managers were allowed to restrict the wearing of crosses.[179]

In all of these cases, ECtHR has been outspoken on the Contracting states' margin of appreciation in determining the limits of freedom of religion in each case and in each national context. The Court has justified its stance by referring to different cultural and legal traditions of each state. In general, it has accepted the argument that limiting religious manifestation may be necessary in a democratic society. In fact, the threshold for imposing those limitations seems to be rather low. Only in *Eweida*, the Strasbourg Court prioritized the applicant's freedom to manifest her religion over the British Airways' wish to project a neutral image of itself, but based on the brief case law review above, the decision seems rather an exception than the rule.

3.3 Comparison of the two non-discrimination frameworks

3.3.1 Institutional background, personal and material scope, procedural aspects

As explained above, the institutional role of the right not to be discriminated against is very different in the two European legal regimes. In EU law, non-discrimination was

[178] *S.A.S. v France*, no 43835/11 (ECtHR 2011), paras 157-159.
[179] *Eweida and Others v the United Kingdom*, nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR 2013), paras 99-100.

originally merely a tool to promote European integration, more specifically the functioning of the single market. It is also one of the areas where the ECJ has been accused of 'activism' i.e. expansive reading of EU law. The Strasbourg Court, however, starts its analysis from one of the substantive articles, in a case of religious non-discrimination from Article 9 (freedom of religion and belief). For ECtHR, non-discrimination is not a right *per se* but a principle that applies within the ambit of other rights of the Convention ("accessory character"). Its violation will not be examined by the Court when other rights in the Convention are regarded as being violated ("subsidiarity").

The personal scope of a right refers to its beneficiaries, whereas its material scope relates to its domains of application.[180] Article 14 ECHR is binding only on public authorities, but protects all physical and legal persons, as individuals or groups of individuals under the jurisdiction of a Contracting Party.[181] In contrast with the ECHR, EU non-discrimination law is binding even in horizontal relationships (between private actors), as confirmed by the EU Court in cases *Mangold* and *Kücükdeveci*.[182] The material scope of Article 14 ECHR is limited, encompassing all areas of national law – but only if one of the Convention rights applies.[183] The material scope of EU non-discrimination law was originally limited but has subsequently been widened.

For both regimes, comparison is the method to define whether discrimination has taken place. If situations are not comparable, the difference of treatment does not need to be justified and cannot be discriminatory. It should be also pointed out that choosing the right comparator, i.e. the situation to compare to, might sound straightforward, but legal practice reveals that it is not. In fact, cases *Achita* and *Bougnaoui* conveniently illustrate this: In *Achbita*, the EU Court and AG Kokott chose to compare Ms Achbita with any other worker who wanted to manifest his religion of belief at work, whereas AG Sharpston compared Ms Bougnaoui with employees who did not manifest any belief.[184]

[180] Besson, S. (2012), p. 160.
[181] Ibid, p. 161.
[182] See chapter 3.1.2.
[183] Besson, S. (2012), p. 162.
[184] Case *Achbita*, para 31; Opinion of AG Kokott, paras 51-53; Opinion of AG Sharpston, para 88.

It goes without saying that the comparator chosen has direct repercussions on the result of the comparison test.

Even though both courts nowadays emphasize substantive equality over formal equality (by acknowledging that sometimes rules that appear equal might have unequal consequences), they still have differing views on the grounds on which direct discrimination can be justified. The wording of Article 14 EHCR as to the potential grounds for discrimination is open-ended. The Court has further underlined the open-endedness by stating that the list written into the Article 14 is "illustrative and non-exhaustive".[185] EU law takes a different stance on the matter. Its list of possible grounds is rather a closed one (i.e. pre-determined).[186] Furthermore, the ECtHR recognizes some grounds as 'suspect', which makes its scrutiny more intense in those cases. This is something that EU law is not familiar with (even though some researchers argue that also the ECJ makes *de facto* distinctions).[187]

Interestingly, where the two courts also diverge is the respect they give to national constitutional requirements. Whereas the ECtHR has been inclined to grant a broad margin of appreciation to the Contracting States in Article 14 cases[188], the ECJ has been accused of excessive activism. This is noted for example by Speekenbrink who points out that the ECJ does not usually let the discretion left to the Member States disturb its rulings.[189] In general, to Speekenbrink, the tension between diversity and uniformity seems less pertinent in the Strasbourg system.[190] This is because, as also Brems notes, the Strasbourg system is not such a "superstructure" as EU law, but rather builds on commonly shared European values.[191] On the other hand, for the EU Court the consensus

[185] *Engel and Others v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR 1976), para 72. However, as explained in chapter 3.2.2, the Strasbourg court's case law is not entirely coherent in this matter.
[186] Speekenbrink, S. (2012), p. 203.
[187] Bell, M. (2011), p. 639; Speekenbrink, S. (2012), p. 267.
[188] Besson, S. (2012), p. 171.
[189] Speekenbrink, S. (2012), p. 247.
[190] Ibid, p. 250.
[191] Brems, E. (1996). Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights, pp. 277-278. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (56), 1996-1-2, pp. 240-350.

among the Member States is not a similar requirement. Its case law suggests that it has not been a determining factor for the rulings taken by the EU Court.[192]

From an institutional point of view, thus, non-discrimination as a legal issue seems to be more fundamental to the functioning and objectives of the European Union.

3.3.2 Freedom of religion v. non-discrimination on religious grounds

Ultimately, the biggest difference between EU law and the ECHR is that they approach the issue of religious discrimination from diverging angles. The approach of EU law is collective (non-discrimination), whereas the ECHR is more focused on the freedom of religion as a civil right, which a state needs to respect by non-interference. In general, EU law sees the principle of non-discrimination contributing to economic and social progress. Therefore, apart from being an individual human right, non-discrimination is also an issue of collective interest. And because of the collective significance attached to it, EU law has adopted a strict stance on non-discrimination. On the contrary, the ECtHR position (on freedom of religion) has traditionally been more lenient.

This difference brings the cases of *Achibita* and *Bougnaoui* into an interesting light. Despite this underlying divergence, in the two cases, the EU Court accepted the position taken by the Strasbourg Court without criticism. Only AG Sharpston recognized the difference in EU law and the ECHR perspectives.[193] Consequently, she was the only one to adopt a strict stand on the issue.

[192] Speekenbrink, S. (2012), p. 262.
[193] Opinion of AG Sharpston, paras 60-62.

4 Cases *Achbita* and *Bougnaoui* from an institutional perspective

This chapter discusses cases *Achbita* and *Bougnaoui* from both legal and institutional perspectives, which of course also intertwine. The text begins with presenting the facts of the cases as well as the ECJ decisions and the two AG opinions preceding those decisions.

The most important observation of the chapter is that the decisions and the preceding opinions of the two Advocates General are internally incoherent and unanimous on several core issues. The EU Court struggles to define whether cases constitute direct or indirect discrimination (or neither), and also fails also build on existing ECJ non-discrimination case law. Instead, in *Achbita* and *Bougnaoui* the EU Court chooses to follow the more restrictive ECtHR example. This is somewhat surprising, taking into account the elementary importance of equal treatment in employment for the objectives of the European Union as a whole, as well as the Court's traditional activism in that area.

The chapter argues that the two decisions reveal the multitude of political, legal and institutional objectives of the European Union, intertwined in ECJ adjudication, in line with the institutional account of the EU Court as presented by Moorhead. In *Achbita* and *Bougnaoui*, the EU Court deems necessary to prioritize sensitive national interests (the constitutional principle of secularism in France and Belgium) over supremacy requirement and legal coherence. The chapter ends by arguing that the ECJ ruled as it did in order to safeguard the stability of the European project in the longer term. In a politically contested area, it would explain the rupture to the Court's previous case law.

4.1 Facts of the cases

Ms Samira Achbita joined G4S Secure Solutions NV (hereinafter referred to as 'G4S'), based in Belgium, as a receptionist under an employment contract of indefinite duration on 12 February 2003. Already in 2003, there was an unwritten company rule that G4S employees were not to wear any religious, political or philosophical symbols while at work. The rule was included into the G4S employee code of conduct at the end of May 2006, with effect from 13 June 2006. At first Ms Achbita, who was already a practicing Muslim at the time when she joined the company, wore headscarf (a hijab) solely outside

working hours. In April 2006, she however announced that in future she would wear a headscarf during working hours as well, for religious reasons. The company management objected to this decision as it considered it to be against the neutrality policy of the G4S. On 12 May 2006, following a period of sickness, Ms Achbita informed the company management that she would be returning to work, wearing a headscarf. On 12 June 2006, Ms Achbita was dismissed, due to her insistence on wearing the Islamic headscarf at work.[194]

On 26 April 2007, Ms Achbita brought before the Labour Court of Antwerp an action for damages for wrongful dismissal against G4S, seeking, in the alternative, damages for infringement of the Law to combat discrimination. In 2009, the Belgian Centre for Equal Opportunities and Combating Racism (Centrum voor gelijkheid van kansen en voor racismebestridjning, hereinafter referred to as 'the Centrum') joined the proceedings as an intervener supporting the arguments of Ms Achbita. By judgment of 27 April 2010, the Labour Court dismissed the action brought by Ms Achbita and stated that no direct or indirect discrimination had taken place. Subsequently also the Antwerp Higher Labour Court took the same position, clarifying that in the light of the lack of consensus in case law and legal literature, the internal policy of G4S could not be judged illegal: Ms Achbita's dismissal could neither be regarded as manifestly unreasonable nor discriminatory.[195] Ms Achbita and the Centrum lodged an appeal in cassation of the judgment. Thereafter the case reached the Belgian Court of Cassation, which decided to refer the following question to the EU Court for a preliminary ruling:

> "Should article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 [establishing a general framework for equal treatment in employment and occupation] be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?"[196]

[194] Opinion of Advocate General Kokott on Case C-157/15, ECLI:EU:C:2016:382, paras 16-19.
[195] Opinion of AG Kokott, paras 20-21.
[196] Opinion of AG Kokott, para 22 (underlinings by the author of this text).

Ms Asma Bougnaoui was employed as a design engineer by Micropole SA, a private sector enterprise operating in France. Her contract of employment with Micropole started on 15 July 2008. In mid-June 2009, she was called to a discussion revealing that her employer was considering dismissing her unless she agreed not to wear her religious veil (a hijab) at work anymore. Ms Bougnaoui refused and was subsequently dismissed by letter of 22 June 2009. According to the letter, the subject of wearing a veil had been addressed with Ms Bougnaoui several times, starting from the job interview. Ms Bougnaoui had been explained "very clearly" that Micropole expected discretion of its employees as regards the expression of their personal beliefs and preferences when interacting with the company's clients ("principle of necessary neutrality").[197] However, the decisive factor seems to have been the negative customer feedback Micropole had received in May 2009. The dismissal letter explains the situation by stating:

> "We asked you to work for the client --- on 15 May, at their site in Toulouse. Following that work, the client told us that the wearing of a veil, which you in fact wore every day, had embarrassed a number of its employees. It also requested that there should be 'no veil next time'."[198]

Based on these facts, the employer had concluded that continuing the contract of employment was impossible, taking into account that much of Ms Bougnaoui's work was supposed to take place at clients' premises. Since Ms Bougnaoui was not considered fit to continue at her position until the end of her notice period – which at the time was still ongoing – the remuneration for that period was withheld by the employer. The letter concludes:

> "We regret this situation as your professional competence and your potential had led us to hope for a long-term collaboration".[199]

In November 2009, Ms Bougnaoui challenged the dismissal before the Paris Labour Tribunal, claiming that it was a discriminatory act based on her religious beliefs. The Association de défense des droits de l'homme, ADDH, intervened voluntarily. By

[197] Opinion of Advocate General Sharpston, paras 22, 23 (4), 23 (5)
[198] Opinion of AG Sharpston, para 23 (3).
[199] Opinion of AG Sharpston, paras 23 (6), 23 (7).

judgment of 4 May 2001, the tribunal held the dismissal to be well founded. On appeal by Ms Bougnaoui and cross-appeal by Micropole, the Paris Court of Appeal upheld the judgment of the Labour Tribunal by judgment of 18 April 2013.[200] Finally, the case reached the Paris Court of Cassation. Since that court felt uncertain of the correct interpretation of EU law in the circumstances of the case, it decided to refer the following question to the ECJ for a preliminary ruling:

> "Must article 4 (1) [of Directive 2000/78] be interpreted as meaning that the wish of a customer of an information technology consultation company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?"[201]

4.2 Legal analysis

4.2.1 ECJ decisions in *Achbita* and *Bougnaoui*

Due to similarities of the facts, the EU Court decided to give its decisions in both cases on the same day, the 14th of March 2017. Both cases were decided in the Grand Chamber format, which is to suggest that the decisions are to be read in parallel. In both cases, a Muslim woman had been dismissed due to wearing an Islamic hijab scarf at work. In *Achbita*, the dismissal was based on existing (recently drafted) company policy prohibiting all visible political, philosophical and religious symbols, whereas in *Bougnaoui* no such written policy existed. This was the first time the EU Court reflected discrimination based on religion or belief in the context of the Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (hereinafter referred to as 'the Framework Directive').

It is good to note, however, that despite the similar contexts the questions referred to the EU Court for preliminary ruling were different. In *Achbita,* the Belgian Court of Cassation was interested in hearing whether the company policy of G4S prohibiting the wearing of

[200] Opinion of AG Sharpston, paras 24-25.
[201] Opinion of AG Sharpston, para 26 (underlinings by the author of this text).

religious scarves was directly discriminatory in a situation where that policy prohibited the wearing of all religious, political and philosophical symbols. On the other hand, in *Bougnaoui*, the French Court of Cassation asked if the wish of a customer was a genuine and determining occupational requirement in the meaning of Art. 4 (1) of the Council Directive 2000/78/EC – and therefore could serve as a legitimate justification for direct discrimination.

In *Achbita*, the EU Court was rather quick to conclude that the internal rule of G4S treated all employees in the same way, by requiring them to dress neutrally. It banned any manifestation of a personal belief, whether based on political, religious or philosophical thinking. Therefore the Court concluded that the prohibition to wear an Islamic headscarf at work, which arises from an internal rule of a private company prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief for the purposes of Art. 2 (2) (a) of the Directive.[202]

In principle, the EU Court acknowledged that the referring court could still ultimately conclude that the apparently neutral policy of G4S actually results in putting persons adhering to a particular religion or belief at a particular disadvantage. In this case, the policy would amount to difference of treatment indirectly based on religion or belief, which, as explained above, is also prohibited under EU law.[203]

That said, the Court uses several paragraphs to "provide guidance" for the national court in the matter.[204] In fact, ultimately the ECJ leaves very little leeway for the national court by being perfectly clear on several issues: Firstly, according to the EU Court, a company's desire to display, in relation with its customers, a policy of political, philosophical or religious neutrality "must" be regarded as legitimate.[205] It also considers a company policy prohibiting all political, philosophical and religious attire an appropriate way to

[202] Case *Achbita*, paras 30-32, 44.
[203] However, as explained above, for indirect discrimination several possible justifications can be found in the context of Art. 2 (b) (i) of the Directive.
[204] Case *Achbita*, paras 36-44.
[205] Case *Achbita*, para 37.

safeguard a neutral image, if that policy is applied in a consistent manner.[206] As far as the last part of the proportionality test is concerned – whether the ban is a necessary means to reach the objective i.e. safeguarding a neutral image – the Court decides to set the bar high. It expects this type of prohibition to be limited to what is "strictly necessary".[207] According to the Court, in this case only a measure limiting the ban to those employees that interact with customers would be strictly necessary. Consequently, the ECJ advises the national court to assess whether it would have been possible for G4S to offer Ms Achbita a post not involving any visual contact with customers, instead of simply dismissing her.[208]

As mentioned above, in *Bougnaoui* the starting point is different. The company in which Ms Bougnaoui was working, Micropole SA, did not have a written policy prohibiting the wearing of political, philosophical and religious symbols. The positions of both women involved direct customer contact, albeit in a different context (Ms Achbita worked as a receptionist whereas Ms Bougnaoui was a design engineer, working in close contact with the company's customers including in their own facilities). It is also to be recalled that in *Bougnaoui* the question referred to the ECJ for preliminary ruling differed from that of *Achbita*. In *Bougnaoui*, the French Court of Cassation wanted to know whether the wish of Micropole SA's customer to no longer work with Ms Achbita, wearing an Islamic headscarf, constitutes a genuine and determining occupational requirement in the meaning of Art. 4 (1) of the Council Directive 2000/78.

In *Bougnaoui*, the Court elaborates on the concept of genuine and determining occupational requirement. It explains that according to Art. 4 (1) of the Directive, it is not the ground on which the difference of treatment is based but a characteristic related to that ground that must constitute a genuine and determining occupational requirement. The Court also points out that in accordance with Recital 23 of the Directive, it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.[209] The final answer of the Court to

[206] Case *Achbita*, para 40.
[207] Case *Achbita*, para 42.
[208] Case *Achbita*, para 43.
[209] Case *Bougnaoui*, paras 37-38.

the question posed is thus concise and clear: it states that the concept of genuine and determining occupational requirement does not cover subjective considerations, such as in this case the customer opinion.[210]

4.2.2 Direct v. indirect discrimination

The first important observation in the decisions and the preceding opinions of the two Advocates General is that they are internally incoherent as to whether cases constitute direct or indirect discrimination – or neither. AG Kokott acknowledges that strictly speaking, a ban such as that imposed by G4S could be regarded as constituting direct discrimination within the meaning of Art. 2 (2) (a) of the Directive as it prohibits the company employees from wearing visible signs of their religious beliefs in the workplace – a wording directly linked to religion. As AG Kokott explains, in its previous case law the ECJ has usually adopted a broad understanding of the concept of direct discrimination, and assumed such discrimination to be present where a measure has been linked to the reason for the difference of treatment.[211]

What makes case *Achbita* different to AG Kokott is that religion is not such an objective fact like race or gender. To her, wearing a religious scarf is based on "a subjective decision or conviction", i.e. the person can choose whether to wear it or not.[212] This is a contradictory view, as argued for example by Vickers. Some people claim that a person can choose his religion and change the ways in which he practices his religion, to avoid the resulting disadvantage. On the other hand, some think that most believers tend to understand themselves as chosen rather than choosing their faith. Also, there is little mobility between religious groups in practice, which might suggest that the existence of free choice is limited.[213] Interestingly the opinion of AG Sharpston in *Bougnaoui* seems to align with this view, in opposition to AG Kokott. To AG Sharpston, religion is not necessarily a chosen characteristic and even when it is, the choice is closely related to an

[210] Case *Bougnaoui,* para 40.
[211] Opinion of AG Kokott, paras 43-44.
[212] Opinion of AG Kokott, para 45.
[213] Vickers L (2017), p. 243. Achbita and Bougnaoui. One Step Forward and Two Steps Back for Religious Diversity in the Workplace. *European Labour Law Journal* (2017), Vol. 8 (3), pp. 232-257.

individual's identity: "Just like skin color or sex, a person's religious identity follows him everywhere".[214]

This difference between the two Advocates General has drastic consequences for their respective conclusions. The fact that AG Kokott regards religion as something one can leave by the door when entering the workplace, leads her to conclude that the measures taken by the employer (G4S) do not constitute unlawful direct discrimination based on religion within the meaning of Art. 2 (2) (a) of the Directive.[215] In its decision, the Court aligns itself to this view.[216] In contrast, in *Bougnaoui* AG Sharpston concludes that a company policy requiring an employee to remove her Islamic headscarf when in contact with clients constitutes unlawful direct discrimination.[217]

4.2.3 Justifications

As explained in chapter 3.1.1, EU law separates between (prohibited) discrimination and (permissible) differential treatment. Differential treatment is accepted in contexts where it is objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary (i.e. the proportionality of the measure). Against this background, it is obvious that the way 'legitimate aims' and 'proportionality' are defined in each case has direct consequences for their conclusions.

In *Achbita* and *Bougnaoui*, the Court seems to be uncertain how to define these two concepts. In *Achbita*, it states that a policy of religious neutrality "must be considered legitimate" taking into account the heavy emphasis EU law puts on the freedom to conduct a business.[218] This approach is cross-referenced by the Court also in *Bougnaoui*.[219] In other words, the ECJ takes for granted that the policy of neutrality is a legitimate aim and therefore justifies differential treatment in a private company. However, simultaneously in *Bougnaoui* the Court also insists that a desire to respect a

[214] Opinion of AG Sharpston, para 118.
[215] Opinion of AG Kokott, para 46.
[216] Case *Achbita*, para 44.
[217] Opinion of AG Sharpston, para 135 (1). ECJ decision in *Bougnaoui* does not take an explicit stance on this issue.
[218] Case *Achbita*, paras 37-38.
[219] Case *Bougnaoui*, para 33.

customer wish cannot be a legitimate excuse for restricting religious outfit. Instead, any such requirement should be objectively justified, relying on the nature of the occupational activities concerned.[220]

As Collins and Howard rightly point out, EU law does not mention neutrality as one of the legitimate aims for differential treatment.[221] The decision in *Achbita* is thus based on the ECJ's interpretation of EU law, not an explicit wording of it. The ECJ stance might have its roots in the changing political landscape in Europe, with the rise of populist movements and the growing influx of immigrants from third countries. Questions of assimilation and toleration are intensely debated across the EU. In her opinion, AG Kokott is outspoken of this reality.[222]

On the other hand, in its Article 9 case law, elaborated in chapter 3.2.3, the Strasbourg Court has used the concept of neutrality. For instance in *Kurtulmus*, it held that a civil servant may be required to dress "neutrally" (by not wearing an Islamic headscarf).[223] In *Dahlab*, the ECtHR required a public school teacher to respect the "neutrality of the State primary-education system", by not wearing a religious headscarf.[224] In *Sahin*, the Court ruled that the aim of protecting the rights and freedoms of others and of protecting public order justifies the restriction of religious outfit in a public university, especially in a state that constitutionally adheres to the principle of secularism.[225]

In all of the aforementioned cases, however, religious neutrality is discussed as a means to uphold state secularism as opposed to a business interest of a private company (as in *Achbita* and *Bougnaoui).* For this reason, case *Eweida* becomes an important point for reference. In *Eweida*, the Strasbourg Court was required to assess whether the British Airways (BA) company dress code was a strong enough excuse to prohibit the wearing

[220] Case *Bougnaoui*, para 40.
[221] Collins, P. (2018). Covering up? Client Embarrassment, Neutral Intolerance and Wearing Headscarves at Work. *Law Quarterly Review*, 134 (Jan), pp. 31-37; Howard, E. (2017), pp. 354-356. Islamic headscarves and the CJEU: Achbita and Bougnaoui*. Maastricht Journal of European and Comparative Law,* 24 (3), pp. 348-366.
[222] Opinion of AG Kokott, paras 2-4.
[223] *Kurtulmuş v Turkey*, no. 65500/01 (ECtHR 2006); Information note on the court's case law No. 82.
[224] *Dahlab v Switzerland*, p. 14.
[225] *Sahin v Turkey*, paras 99, 116.

of a religious cross from Ms Eweida, a BA employee. When considering the aim of the dress code i.e. communicating "a certain image of the company", the Court found that it was legitimate.[226] It did not use the term neutrality as such but substantively, the idea seems to be similar. In *Achbita*, also the ECJ seems to interpret *Eweida* in this way.[227]

It is also to be recalled that under EU law, justifying differential treatment directly based on prohibited grounds is more difficult than justifying indirect discrimination. Direct discrimination on grounds of religion or belief is only possible if the nature of the particular occupational activities so insist ("a genuine and determining occupational requirement"), or if it is necessary for the maintenance of public order and security, or for the protection of the health, rights and freedoms of others.[228]

Here again, the ECJ decisions and the preceding opinions of the two Advocates General differ. AG Kokott emphasizes the role of the employer who should have the power to define whether specific occupational requirements are 'genuine and determining'. To AG Kokott, the employer must be allowed "a certain degree of discretion in the pursuit of its business, the basis of which lies ultimately in the fundamental right of freedom to conduct a business".[229] It is also perfectly legitimate for the employer to require a religiously neutral dress code of his employees, if that is what his customers wish for.[230] AG Kokott therefore concludes that a ban as such laid down by G4S may be regarded as a genuine and determining occupational requirement within the meaning of the Directive.[231] She also argues that the wearing of visible signs of religious beliefs may be prejudicial to the rights of freedoms of other employees and customers as well as to the employers' freedom to conduct a business.[232]

On the contrary, AG Sharpston refuses to accept that Ms Bougnaoui would have been unable to perform her tasks as a design engineer just because she wore an Islamic

[226] *Eweida and Others v. the United Kingdom*, para 93.
[227] Case *Achbit*a, para 39.
[228] See chapter 3.1.1.
[229] Opinion of AG Kokott, para 81.
[230] Opinion of AG Kokott, para 92.
[231] Opinion of AG Kokott, para 84.
[232] Opinion of AG Kokott, para 132.

headscarf. Consequently, to her, the requirement of not to wear a religious headscarf while in contact with customers cannot be considered a genuine and determining occupational requirement in the meaning of Article 4 (1) of Council Directive 2000/78.[233] AG Sharpston further adds that direct discrimination can neither be justified on the ground of potential financial loss that might be caused to the employer.[234] She also rejects the idea that a prohibition of wearing religious symbols would be necessary for the protection of the rights and freedoms of others.[235] According to existing ECJ case law, both Article 4 (1) i.e. the occupational requirements and Article 2 (5) must be interpreted strictly.[236]

Besides the legitimate aim requirement, also the proportionality aspect requires further attention. In *Achbita*, the Court suggests that the requirement of religious neutrality only applies to employees with customer contact, and even on those occasions, the measures taken must be "strictly necessary".[237] At first sight, the Court thus seems to impose a strict justification test – as it has usually done in non-discrimination cases.[238] That said the ruling leaves questions as to actual implementation of that test. Is it really the intention of EU legislator to promote non-discrimination in employment by hiding certain employees out of sight, as the EU Court suggests? That would seem to run counter even the EU Court's own approach to promoting "pluralism and broadmindedness as hallmarks of a democratic society".[239] The interpretation is controversial also taking into account the Court's earlier decision in *CGKR / Firma Freyn*, where it explicitly stated that a situation where an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, based on its clients' wishes, constitutes direct discrimination.[240] Why

[233] Opinion of AG Sharpston, para 102.

[234] Opinion of AG Sharpston, paras 100, 133. On the contrary, as concerns indirect discrimination, the interests of the employer's business may constitute a legitimate excuse, but even in those cases the measures taken need to be proportionate. Opinion of AG Sharpston, para 135 (2).

[235] Opinion of AG Sharpston on Case C-188/15, paras 104-105. See also Vickers, p. 240.

[236] See e.g. case C-447/09 *Prigge and others v Deutsche Lufthansa AG*, paras 56, 72.

[237] Case *Achbita*, para 42.

[238] Howard, E. (2017), pp. 360-361.

[239] E.g. *Sahin v Turkey*, para 108.

[240] Case C-54/07, *CGKR v Firma Feryn NV*., para 25. The preceding opinion of Advocate General Maduro further elaborates: "The contention made by Mr Feryn that customers would be unfavourably disposed towards employees of a certain ethnic origin is wholly irrelevant to the question whether the Directive applies. Even if that contention were true, it would only illustrate that 'markets will not cure discrimination' and that regulatory intervention is essential. Moreover, the adoption of regulatory measures at Community level helps to solve a collective action problem for employers by preventing the

would it then be acceptable for an employer to hide these employees out of sight due to its clients' wishes?

4.3 Institutional analysis

4.3.1 Integration

As it has become clear, non-discrimination in employment is an area where the EU Court has been very active. There are several landmark cases in that area, which have underlined the supremacy of EU law and promoted legal integration within the Union.[241] During the past decades, the scope of EU non-discrimination law has been expanded with active support of the ECJ: whereas before only the grounds of sex and nationality could be invoked in private disputes, now the horizontal direct effect of EU non-discrimination law takes place in various settings and on various grounds.[242] Cases such as *Mangold* and *Kücükdeveci* have also clarified that for the ECJ, the principle of equal treatment is one of the general principles of EU law (only given expression in Directive 2000/78), originating from various international instruments and constitutional traditions common to the EU Member States.[243] It has thus become one of the fundamental building blocks of EU law.

Therefore, the most glaring finding in the analysis above is that in *Achbita* and *Bougnaoui*, the EU Court left unutilized the possibility to build on its previous case law in non-discrimination and chose instead to follow the ECtHR. In other words, it chose restraint over activism. This is also noted by Howard who points out that in *Achbita* and *Bougnaoui*, the EU Court treated the grounds of religion differently from other grounds of discrimination covered by EU non-discrimination law. To Howard, especially the justification test that the Court used was more lenient than normally.[244] Also Vickers criticizes that in *Achbita* and *Bougnaoui* the EU Court left unutilized the opportunity to

distortion of competition that precisely because of that market failure could arise if different standards of protection against discrimination existed at national level." Opinion of Advocate General Maduro on CGKR v Firma Feryn NV, ECLI:EU:C:2008:155, para 18.

[241] Case *Mangold*, para 78; Case *Dekker*, para 25; Case *Kücükdeveci*, para 51.

[242] de Mol, M. (2011), pp. 109-110.

[243] Case *Mangold*, paras 74-75, Case K*ücükdeveci*, para 50.

[244] Howard, E. (2017), pp. 360-361.

establish strong standards on how to protect religious equality at work, as it has done with other discrimination grounds.[245]

As in all other cases, also in *Achbita* and *Bougnaoui* the EU Court had in its disposal the general principles doctrine. In theory, it could have used it to push for a uniform stance at EU level on equal treatment in employment. However, it decided not to use it. In *Bougnaoui*, the EU Court briefly mentions that among the constitutional traditions shared by the Member States (i.e. the general principles of EU law) is the right to freedom of conscience and religion, but leaves the issue unelaborated.[246] In *Achbita*, AG Kokott mentions the general principles doctrine once, but in the context of freedom to conduct a business.[247] To her, the freedom to conduct a business weighs more in the scale than the freedom of religion. Interestingly, AG Sharpston ends up with an exact opposite conclusion by arguing that if the business interest of an employer cannot be reconciled with the right of an individual employee to manifest his religious convictions, it is the latter (and not the former) that should prevail.[248] In her opinion, AG Sharpston recognizes the general principles doctrine, which she argues "must apply also to religious discrimination".[249] The emphasis she puts on religious non-discrimination as a principle and objective of EU law is apparent, in contrast to the opinion of AG Kokott.

Another key tool of the ECJ to promote legal integration is the doctrine of supremacy. Here again, the EU Court struggles to decide whether to prioritize Member State discretion over supremacy of EU law, or the other way around. In short, AG Kokott seems to give more emphasis to the former and AG Sharpston to the latter.

In her opinion, AG Kokott acknowledges both the potential of the case to influence the labor market across the EU as well as the capacity of the ECJ – in principle – to make such a ruling.[250] However, her objective is clearly not to push the ECJ to take such a role. First, she recognizes both the division of competences between the Union and its Member

[245] Vickers, L. (2017), pp. 232-257.
[246] Case *Bougnaoui*, para 29.
[247] Opinion of AG Kokott, para 134.
[248] Opinion of AG Sharpston, para 133.
[249] Opinion of AG Sharpston, para 62.
[250] Opinion of AG Kokott, para 6.

States as well as the obligation of the EU under Article 4 (2) TEU to respect the national identities of the Member States, including in the context of equal treatment.[251] More specifically, AG Kokott emphasizes the importance of recognizing the constitutional principle of secularism in France as well as its capacity to affect the way people dress themselves:

> "[I]t is important, when interpreting and applying the principle of equal treatment, to have regard also to the *national identities of Member States inherent in their fundamental structures, both political and constitutional*… this may mean that, in Member States such as France, where secularism has constitutional status and therefore plays an instrumental role in social cohesion, too, the wearing of visible religious symbols may legitimately be subject to stricter restrictions (even in the private sector and generally in public spaces) than in other Member States, the constitutional provisions of which have a different or a less distinct emphasis in this regard." (italics added)[252]

Moreover, she underlines the fact that policies and legislation in different EU Member States vary in this matter.[253] Consequently, she is ready to recommend the ECJ to follow the example of the Strasbourg Court in recognizing the margin of appreciation of the Member States in this area:

> "In a case like this, the proportionality test is a delicate matter in the context of which the ECJ, following the practice of the ECtHR in relation to Article 9 and 14 case law, should grant the national authorities a measure of discretion… In this regard, the Luxembourg court does not necessarily have to prescribe a solution that is uniform throughout the European Union."[254]

Also AG Sharpston acknowledges that this is an area of law where views and practices differ within the Union. There is no uniform understanding of the role of religion in society, and the practices regarding the wearing of religious outfit in employment vary.[255] Despite that, she requires that the same standards are consistently applied to all grounds

[251] Opinion of AG Kokott, para 32.
[252] Opinion of AG Kokott, para 125. During the proceedings, the French government itself made a distinction between the public sector, where the principle of secularism applies, and the private sector, where it does not apply (Opinion of AG Kokott, para 31). Against this background, it becomes particularly interesting that AG Kokott seems to be ready to blur the line between these two spheres.
[253] Opinion of AG Kokott, para 41.
[254] Opinion of AG Kokott, para 97.
[255] Opinion of AG Sharpston, paras 28, 34, 36.

for discrimination.[256] AG Sharpston recognizes the principle of secularism in the French and Belgian constitutions[257], but as opposed to AG Kokott, highlights the important task of adjudicators to ensure that EU non-discrimination law is consistently applied also in those contexts. AG Sharpston also acknowledges the wider protection provided by EU law in non-discrimination cases, and sees no need to align the view of the EU Court with the views of the ECtHR (which from Art. 9 perspective has taken a more restrictive stance on the issue).[258]

Finally, to AG Sharpston, allowing discriminative treatment for a private sector employer due to customer feedback is a particularly dangerous idea, as it legitimates unequal treatment of the most vulnerable groups in the labor market, only because some prejudiced people require so. This hampers the effectiveness of EU non-discrimination law, in fact running counter to its whole *raison d'être*.[259]

4.3.2 Stability

From the point of view of stability, as understood by the institutional theory, the legal analyses taken by the two Advocates General and the EU Court in cases *Achbita* and *Bougnaoui* reveal interesting divergences. First, there seems to be agreement on specific national constitutional requirements being involved, but views on their repercussions vary. Second, both AG Kokott and AG Sharpston agree that the cases have the capacity to promote legal coherence within the Union, but disagree on whether it is the desired direction. Finally, they both recognize the EU Court's two options of either imposing a ruling from above or delegating the decision-making power to domestic level. Unsurprisingly, the two Advocates General have differing opinions on which option to choose.

[256] Opinion of AG Sharpston, e.g. paras 62, 68. As a follow-up to this, Vickers also asks why a national identity should be allowed to justify religious discrimination if it is not a legitimate excuse to justify other forms of discrimination either. Vickers. L. (2017), p. 249.
[257] Opinion of AG Sharpston, para 38.
[258] Opinion of AG Sharpston, para 63.
[259] Opinion of AG Sharpston, paras 120-121.

It is notable that in all of these aspects, the Grand Chamber of the ECJ finally aligns itself with the opinion of AG Kokott: by prioritizing the sensitive national interests of the Member States involved in the cases, by giving space to legal incoherence instead of integration, and by choosing the margin of appreciation over supremacy of EU law. In this way, it perhaps hopes to keep the scales in balance, to be able serve the purposes of integration in the longer run. This hypothesis seems to get support at least from Vickers:

> "National approaches to religion or belief have long caused tension at the constitutional level of the EU, as seen in the difficult debates in the drafting of the EU treaties and the development of the EU constitution. [---] It may be that as far as EU integration is concerned, losing sovereignty on matters of religion would be a step too far. Given the poor level of political capital enjoyed by the EU currently, it is unsurprising that the CJEU has taken an approach that is deferential to national context. To do otherwise could have pushed social integration at European level further than most Member States would tolerate."[260]

To conclude, one would perhaps be tempted to jump into the conclusion that the decisions the EU Court took in *Achbita* and *Bougnaoui* were unfavorable to the objective European integration, by not posing the cohesion requirement on the Member States. However, taking into account the current political atmosphere in Europe it may rather be that the long-term stability of the European project was better preserved with a restrictive stance. Perhaps Vickers has a point in arguing that judicial activism in this area, at this political juncture, would have been too much for the Member States to handle.

4.3 Additional observations

Article 9 ECHR case law mostly concentrates on wearing of Islamic headscarves. Thus, even though directly linked to religion, the cases are indirectly linked to also gender. The approach of the ECtHR to the issue has changed during the recent decades. In *Dahlab* (2001) the Strasbourg Court still claimed, that the wearing of headscarf seems to be

[260] Vickers, L. (2017), p. 255-256. Piris interestingly points out that already during the French ratification debate of the (failed) Constitutional Treaty, the French Constitutional Council ruled on the compatibility of the Treaty with the French constitution. The French were concerned precisely of the compatibility of the right to manifest one's religion in public with the constitutional status of France as a secular republic (*une République laïque*), posing certain restrictions on that right. Piris, J. (2010). *The Lisbon Treaty: A legal and political analysis*. Cambridge [UK]; New York: Cambridge University Press, pp. 156-157.

imposed on Muslim women, and therefore the practice is hard to reconcile with the principle of gender equality. For this reason, religious headscarves could be banned in a school environment.[261] By contrast, in its judgment *S.A.S.* (2014), the ECtHR argued for an opposite view, claiming that a State Party cannot invoke gender equality to ban a practice that is defended by women themselves.[262] As far as the EU Court is concerned, in *Achbita* and *Bougnaoui* the two Advocates General agreed that the issue of gender was not relevant to the cases.[263]

It would be tempting, however, to think a bit further. As seen in chapter 3, the EU Court has been adamant to support equal access to employment, as an important prerequisite for economic and social progress within the Union. Overall, gender is one of the most frequently discussed ground for discrimination. Despite this background, the EU Court did not give the issue much thought. Was gender related to the dismissals of Ms. Achbita and Ms. Bougnaoui? In my view, it was, because despite seemingly neutral formulation of a company policy, in practice a ban restricting the wearing of religious outfit at work affects mostly Muslim women.

In this context, it would also be tempting to take a deeper look at whether differences of treatment based on some other grounds are present. The grounds of 'ethnicity' or 'colour' immediately come to mind, both covered by Art. 2 (2) (b) Directive 7000/78. In its decisions, the EU Court does not pay attention to either of these grounds. Only AG Kokott shortly raises this option, but soon concludes that a company rule at issue (in *Achbita*) does not put employees of a particular colour or ethnic background at a particular disadvantage.[264] Surely, the wording of a company rule prohibiting the visible wearing of all religious, political, or other signs is neutral. However, in practice such a rule may put people of a specific background in a disadvantaged position.

Finally, both *Achbita* and *Bougnaoui* raise the question whether to prioritize the individual's freedom of religion over the employer's freedom to conduct a business, or

[261] *Dahlab v. Switzerland*, "THE LAW" > paragraph 2, p. 13.
[262] *S.A.S. v France*, no 43835/11 (ECHR 2014), para 119.
[263] Opinion of AG Kokott, paras 49, 121; Opinion of AG Sharpston, paras 30, 75.
[264] Opinion of AG Kokott, para 121.

the other way around. To AG Sharpston, the former seems to weigh more[265], and to AG Kokott, the latter[266]. This divergence has crucial consequences for their respective opinions. Groussot, Pétursson and Pierce have recently investigated the EU Court post-Lisbon Art. 16 EUCFR adjudication (freedom to conduct a business) and concluded that the Court still seems to be strongly economically oriented, especially in horizontal situations where social and constitutional economic rights are in conflict.[267] Cases *Achbita* and *Bougnaoui* would therefore constitute an interesting context also for this discussion.

[265] Opinion of AG Sharpston, para 133: "In the last resort, the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions." See also Sharpston para 100, where she seems to justify her position on the need to limit, in some cases, the individuals freedom to conduct a business.

[266] Opinion of AG Kokott, para 134: "In a Union which regards itself as being committed to a social market economy (second sentence of Article 3 (3) TEU) and seeks to achieve this in accordance with the requirements of an open market economy with free competition (Articles 119 (1) TFEU and 120 TFEU), the importance that it attaches to freedom to conduct a business is not to be underestimated. That fundamental right, which, previously, already constituted a general principle of EU law, is now enshrined in a prominent position in Article 16 of the Charter of Fundamental Rights."

[267] Groussot, X., Pétursson, G. T. and Pierce, J. (2017). *Weak right, strong Court – the freedom to conduct business and the EU Charter of Fundamental Rights*, p. 344. In Douglas-Scott, S. & Hatzis, N., eds. (2017). *Research handbook on EU law and human rights*. Northampton, MA: Edward Elgar Publishing Limited, pp. 326-344.

5 Conclusion

The role of religion in European societies has been a polemic issue for a long time and with all likelihood continues to be so. On the one hand, European cultures, identities and societies, including their legal systems, are strongly shaped by one of the great world religions, Christianity, and cannot be fully understood but through that lens. On the other hand, religion in Europe has always been also a divider. Already in the 11th century, the Christendom was split into two i.e. the Eastern (Orthodox) and the Western (Catholic) churches. Currently, secularization is spreading in West European countries, whereas in Eastern Europe (the former Soviet states) religions are gaining new ground.[268] Views are polarizing also within state borders, as testified by the rise of conservative and rightwing movements across Europe. These movements get their vitality from fear and prejudice, which have fertile ground in the increased Islamist terrorism as well as large-scale (and sometimes poorly managed) immigration from areas neighboring Europe, often with Muslim majorities.

The European Court of Human Rights, based in Strasbourg, has a long experience of adjudicating cases related to exposure of religious signs and outfit. Its view has usually been in favor of the respondent, in contrast with the individual claiming the breach of his right to freedom of religion. National adjudicators in Europe have taken divergent views on the issue. On the one hand, there are countries such as France and Belgium – where the two cases discussed originate from – which prohibit the wearing of religious outfit in public and as well as in public employment. On the other hand, there are countries such as the UK, or Finland, which have not deemed necessary to restrict the ways people manifest their religion in public (or at work).

The EU Court was faced with the issue of religious discrimination for the first time in cases *Achbita* and *Bougnaoui*. Perhaps not that surprisingly, it was as tormented by the issue as the continent as a whole. Afterwards the decisions have been heavily criticized

[268] Pew Research Center: ”Eastern and Western Europeans Differ of Importance of Religion, Views of Minorities, and Key Social Issues”. https://www.pewforum.org/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues/. Accessed 2nd May 2019.

for their incoherency and loose argumentation, not to mention the rupture to the Court's previous case law. This thesis agrees with much of the criticism posed.

However, as explained in the introductory chapter, the main objective of this thesis has been neither praising nor criticizing the decisions. The intention has rather been to shed some light on the historical, legal and political context the EU Court operates in, which the thesis claims to have a substantive impact on the court's human rights rulings. To be more precise, the thesis argues that the EU Court not only assesses each case at hand from a point of view of EU law in a strict sense, but also from the viewpoint of its relevance for the larger European project. In other words, the ECJ assesses whether and how the case contributes to the stability of that project, and conversely whether the case has the capacity to undermine the long-term objectives of that project.

To clarify, this is not to argue that the EU Court could not – or would not – take decisions that are unwanted by the EU Member States. On the contrary, it has done that since its origin, and continues to do so.[269] However, as Moorhead argues, it is one thing to question the acceptability of a decision, and another to dispute the viability of the EU Court altogether.[270] From an institutional point of view, this is an important thing to keep in mind. Throughout the decades, the ECJ has been criticized for making hasty conclusions and for using its power against the interests of the Member States. Despite all this, it is also a court with high prestige, capacitated with a wide mandate by the Member States. It

[269] The past few years have witnessed several fundamental rights cases where the EU Court and national constitutional courts have been in discord. For instance, in 2012 the Czech Constitutional Court (in Pl. ÚS 5/12) declared the decision of the ECJ in C-399/09 *Landtóva ultra vires*. E.g. Komárek has provided a useful analysis of the case including its legal and political background. See Komárek, J. (2012). Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII. *European Constitutional Law Review,* 8 (2), pp. 323-337. Another recent example is the decision of the Danish Supreme Court to disregard the ECJ preliminary ruling in case C-441/14 *Dansk Industri*, claiming that the ECJ does not have competence to give precedence to an unwritten principle of EU law prohibiting discrimination on grounds of age in a case where it is contrary to national law. Further analysis see e.g. Šadl, U. and Mair, S. (2017). Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A. *European Constitutional Law Review*, 2017, Vol. 13 (2), pp. 347-368.

[270] Moorhead, T. (2014), pp. 61-62.

is the high court of the Union, and its functioning remains of elementary importance for the European project – initiated and maintained by the Member States themselves.

The thesis starts from the observation that the rulings the EU Court took in cases *Achbita* and *Bougnaoui* constitute a rupture to its previous non-discrimination case law. Instead of acknowledging the importance of religious non-discrimination for the European single market in general and inclusive labor market in particular, the decisions seem to downplay its significance in relation to other grounds for discrimination. References to the Court's previous non-discrimination case law are practically non-existent in the Court decisions, as if it was not a relevant context for the cases. On the other hand, the European Convention and the ECtHR case law are constantly referred to in the decisions, even though they emphasize freedom of religion as opposed to non-discrimination on religious grounds, the latter being a more natural angle to EU law. In the decisions, the margin of appreciation of the EU Member States is highlighted, in contrast with the supremacy doctrine usually adhered to by the EU Court.

As regards coherence between the two human rights regimes, which has been an issue for a long time, *Achbita* and *Bougnaoui* first seem to provide alleviation: the EU Court decisions in the two cases are well in line with the Strasbourg Court Art. 9 case law. On a closer look, however, problems with the chosen approach become visible, primarily the obvious differences between the two human rights regimes, not to mention the fact that EU law provides the possibility to grant a higher level of protection for human rights than the ECHR (as shortly discussed in chapter 2.3.2). Only AG Sharpston raises this option in her opinion. Overall, she is the only one to give recognition to the differences between the approaches of the two human rights regimes to non-discrimination.

The thesis thus reveal some of the problems still attached to the European human rights regime: The European Union as a legal system has been constructed upon specific interests and objectives, which differ from those of the Council of Europe and the ECHR. Both the *raison d'être* and the *modus operandi* of the two systems are markedly different. From another perspective: in cases where the EU Court heavily leans on the Strasbourg court, it may – accidentally or deliberately – disregard some of the parameters of EU law.

Based on this it therefore seems that comparison of the EU Court's human rights case law with the Strasbourg Court's case law continues to be necessary. The Lisbon Treaty has not eliminated the barriers between the two regimes, nor does synchronization seem a probable future scenario. Non-discrimination is one of the areas where the institutional differences between the two regimes need to be taken into account.

For the purposes of this thesis, the two cases reveal the contextual reality in which the EU Court operates. Despite its widened human rights mandate, the ECJ is not a human rights court but the high court of the European Union. It is an autonomous, but not a politically or legally isolated organization. In *Achbita* and *Bougnaoui* the Court was forced to balance between its various objectives and decided to prioritize stability over legal coherence. Taking into account the current political climate, it may have chosen wisely. However, for the purposes of creating a prosperous single market in general and an inclusive labor market in particular, the decisions seem inexpedient. As Europe is becoming more and more heterogeneous, religious and cultural pluralism are issues that also the European Union needs to learn to utilize (instead of trying to curtail them).

Theoretically, the thesis argues that the institutional theory as presented by Moorhead provides a fruitful framework for analyzing the Court's line of reasoning. According to Moorhead, in its adjudication the EU Court aims at sustaining the supremacy of EU law, in a manner consistent with the Member States' constitutional requirements, while also advancing the project of European integration. In other words, it aims at reaching balanced decisions – not because it is pressured to do that by the Member States, as intergovernmentalists would argue, but because it is in the Court's own interest to do so. The theory seems to provide a convincing answer to the question why the EU Court sometimes shows restraint, even in situations where it is not expected to do so. It may very well be the case, as Moorhead argues, that the institutional positioning of the EU Court makes its case law hard to predict. Based on the two cases it seems that the emphasis the EU Court gives – in a specific field of law, at a specific juncture – to its various objectives, has a direct bearing on its rulings.

To conclude, the aim of this thesis is not to argue that the institutional theory would provide an all-encompassing or exclusive framework in which to analyze the EU Court's human rights decisions. Rather, the main argument of this thesis is that in constructing the picture of the EU Court as a human rights adjudicator – a task that is more pertinent than ever before – its institutional positioning needs to be taken into account. It is echoed in the ways the ECJ uses the doctrine of supremacy, the ways it draws (or does not draw) parallels between EU law and international human rights law, particularly the ECHR, and the ways it balances between EU law and national law. If nothing more, cases *Achbita* and *Bougnaoui* show that these are among the issues the EU Court considers in making its rulings.

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